

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN,)
on behalf of itself and all)
others similarly situated,)
Plaintiffs,)
v.) No. 02 C 5893
HOUSEHOLD INTERNATIONAL, INC.,)
et al.,) Chicago, Illinois
Defendants.) May 23, 2016
1:30 p.m.

TRANSCRIPT OF PROCEEDINGS - PRETRIAL CONFERENCE
BEFORE THE HONORABLE JORGE L. ALONSO

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1 THE CLERK: 02 C 5893, Jaffe v. Household.

2 MR. DOWD: Good afternoon, Your Honor. Michael Dowd.

3 And I have with me my partners again, Spence Burkholz, Dan
4 Drosman, Luke Brooks, Maureen Mueller, and also Hillary Stakem
01:35:01 5 of our office; and Marvin Miller of the Miller Law firm for
6 the plaintiffs.

7 MR. STOLL: Good afternoon, Your Honor. Ryan Stoll
8 on behalf of Household, my colleague Pat Fitzgerald. And then
9 we also have at counsel table as we did on Wednesday, Steve
01:35:12 10 Farina, Amanda McDonald, Dean Butswinkas, and Leslie Mahaffey.

11 MR. BUTSWINKAS: Good afternoon, Your Honor.

12 THE COURT: Good afternoon.

13 MR. SOFFER: Good afternoon, Your Honor. Gil Soffer.
14 I'm here with Dawn Canty. We're here on behalf of William
01:35:27 15 Aldinger.

16 MR. LEONARD: Your Honor, Tim Leonard, Jackson
17 Walker, on behalf of David Schoenholz.

18 MR. ROSENBLOOM: Good afternoon, Your Honor. David
19 Rosenbloom on behalf of defendant Gilmer.

01:35:37 20 THE COURT: Thank you.

21 It's come to my attention that the parties have been
22 conferring and trying hopefully to resolve some issues.

23 MR. DOWD: Yes, Your Honor. First, thanks for the
24 time this morning. We appreciate it. Hopefully it will be
01:35:48 25 helpful.

1 We've reached certain agreements between the parties
2 regarding the evidence and the scope of the trial.

3 And we've also reached an agreement on a joint
4 statement of the prior proceedings based on the version that
01:36:04 5 the Court handed down. I'll try to be brief. We have to have
6 these documents cleaned up, Your Honor, because no one had a
7 chance to go back to their office.

8 But basically the agreement overall regarding the
9 evidence and the scope of the trial, there's going to be an
01:36:19 10 agreement with respect to joint and several liability by
11 Household, Aldinger, and Schoenholz. Mr. Gilmer is going to
12 agree to a -- to be severally liable for 2 percent of any
13 judgment but only if he's found liable because he's only in on
14 the March 23rd statement. And then there will be no other
01:36:46 15 adjudication of fault or an allocation of fault by the jury at
16 the trial.

17 That said, we've, as I said earlier, agreed on a
18 statement of the case, which I think we can actually hand up
19 to the Court; but it may be better to wait until later this
01:37:00 20 afternoon so everybody is on the same page. But that's done.
21 And it also has an exhibit attached to it with the false
22 statements.

23 THE COURT: And that reflects the now narrower scope?

24 MR. DOWD: Yes, Your Honor. The scope is -- no, the
01:37:15 25 scope is dictated in the agreement regarding the evidence.

1 And basically the way it's going to work, Your Honor, with the
2 Court's permission obviously, the parties have agreed that
3 plaintiffs will only call I believe it's four witnesses,
4 Ghiglieri, Devor, who were two of the experts, Mr. Stroom, if
01:37:36 5 we so choose, and our loss causation expert, Mr. Fischel. And
6 we can also play the deposition testimony of Chuck Cross.

7 So there were basically about five witnesses that we
8 were going to call. There are limitations on the scope of
9 those -- at least on the scope of Mr. Devor and
01:38:01 10 Ms. Ghiglieri's testimony that's documented in this agreement
11 which we will give to the Court later today or first thing
12 tomorrow.

13 The defendants are going to be calling their loss
14 causation experts, Ferrell and Cornell. They're also allowed
01:38:17 15 to call Mr. Stroom if we don't call him in our case. And
16 there may be a necessity to play the deposition of Dennis
17 Hueman if certain evidence -- if we choose to use certain
18 evidence, in particular the Hueman video, they'd be allowed to
19 play his deposition designations.

01:38:41 20 There are limits, as I said, on Ghiglieri and Devor
21 as to the scope of their testimony that the parties have
22 stipulated to. Issues with respect to the witnesses Bajaj and
23 Glickenhau, those are to be decided by the Court. There's no
24 agreement on them. There's motions in limine that are
01:39:01 25 directed at both of those witnesses.

1 We've agreed on the exact testimony of Mr. Cross that
2 will be played by deposition, so there's no more dispute as to
3 that. There is no other deposition testimony that will be
4 played.

01:39:16

5 We reached agreements, Your Honor, about the
6 categories of evidence that we discussed last Wednesday in
7 connection with defendants' motion in limine No. 1. And
8 essentially, Your Honor, there are -- there's probably one or,
9 I guess, maybe two of your rulings where we made slight tweaks
10 to the Court's initial ruling; but we'll give you -- that to
11 the Court. I mean, it basically just sets out which
12 categories are in and which categories are out and --

01:39:37

13 THE COURT: By agreement of the parties?

14 MR. DOWD: By agreement of the parties, Your Honor.

01:39:53

15 MR. FARINA: It's a little more extensive than that,
16 but we'll provide an order. Certain categories, A, C, and H,
17 which previously had not been excluded are now being excluded
18 by agreement. And as to category E, which had been excluded,
19 we've agreed on a carve-out that allows some of those
20 documents to be used for certain purposes. But, again, we'll
21 provide all of this in an order for Your Honor.

01:40:14

22 MR. DOWD: And then there's some other -- there's
23 some issues with respect to some of defendants' exhibits. But
24 that's also laid out in here in this same paragraph of the
25 agreement as to certain documents that they want to use with

01:40:29

1 Professor Fischel that we would object to.

2 There's also, Your Honor, an agreement about, you
3 know, hearsay, relevance, authenticity, foundation of any
4 documents that were used in the first trial. It's a very
01:40:51 5 specific agreement where defendants won't be able to object as
6 to certain very broad categories of documents with respect to
7 those issues. And obviously that's -- you know, it's more
8 detailed than that.

9 There are some exceptions, if a party opens the door,
01:41:23 10 that some evidence can come in, but I guess we'll all cross
11 that bridge when we come to it.

12 And then there are some specific provisions with
13 respect to some of the loss causation experts as to at least
14 one category of the documents that we agreed to exclude
01:41:30 15 generally. You can question the loss causations about it --
16 experts about it to the extent it goes to loss causation. In
17 particular, it's really the settlement documents, Your Honor,
18 because some of those related to loss causation, at least in
19 our view. And so even though, generally, we're not putting in
01:41:48 20 most of those documents, to the extent it's relevant to a loss
21 causation expert, it could be used. But, again, that's --
22 there's a very specific agreement with respect to that that,
23 you know, the parties have entered into.

24 So that's, I believe, the bulk of the agreement, Your
01:42:05 25 Honor.

1 THE COURT: It sounds like I can anticipate a joint
2 filing then --

3 MR. DOWD: Yes, Your Honor.

4 THE COURT: -- documenting all of these agreements?

01:42:14

5 MR. FARINA: Yes, Your Honor.

6 MR. DOWD: Yes. Again, we appreciate all the time
7 this morning. There's a lot of -- every time you change one
8 paragraph, another one changes.

01:42:23

9 THE COURT: Well, what do the parties suggest in
10 terms of how to proceed today? Obviously I had one plan in
11 mind; but much of what was going to be decided changes now
12 with the parties' agreement, which I'm still not completely
13 aware of.

14 MR. FARINA: There are --

15 MR. DOWD: I think that's right. There's still -- go
16 ahead.

01:42:51

17 MR. FARINA: There are some motions in limine that I
18 think are still alive. But we have, I think, pretty
19 significantly resolved a number of the open disputes. This
20 agreement will result in the trial involving roughly half the
21 witnesses that might have otherwise testified and it removes
22 allocation, proportionate fault, as a disputed issue. We
23 think this will significantly reduce the amount of time that
24 will be needed for the trial.

01:43:09

25 The parties have discussed a maximum amount of time

1 that they would split, obviously subject to Your Honor's
2 approval; but we think this is now a two-week trial at most.
3 And our thought was to come up with a budget to split that
4 between the two of us based on obviously your approval and our
01:43:31 5 ability to get that done. We were thinking we would split
6 60 hours, and that that would be over two weeks.

7 MR. DOWD: That's correct, Your Honor. And whether
8 it goes that long or not, I don't know. It's just that we've
9 been working on this all weekend, and I haven't had time to
01:43:48 10 sit down and count up hours.

11 THE COURT: So the parties will contemplate whether
12 they want to go into an agreement like that. If they want to,
13 that is fine. The only downside in my experience is that both
14 sides then think they must use all 30 hours. So there's no
01:44:02 15 confusion there, it's not an order that you use 30 hours,
16 right?

17 The other thing is that we won't be able to monitor
18 it. Ms. LaBella does an amazing job. She timestamps every
19 tenth line, so the parties will have that information so that
01:44:18 20 you don't have to have someone dedicated specifically to
21 keeping time. But the parties will be in charge and hopefully
22 the parties will agree as to the time.

23 MR. DOWD: We'll work on it each day, Your Honor. We
24 had somebody who did it at the last trial and, frankly, he's
01:44:30 25 just not very good at it, but we'll probably have him do it

1 again.

01:44:45

2 THE COURT: So, Mr. Dowd, what do you suggest? Do
3 you suggest, just to make sure that we're all on the same
4 page, that I go forward with the plan? In other words, we
5 start with plaintiffs' No. 3 motion in limine and then we
6 discuss on the record whether there's still a need to go into
7 it and in that way make sure that we don't miss anything?

01:44:58

8 MR. DOWD: I think that makes sense, Your Honor. I
9 think like, for example, on motion in limine No. 3, I think
10 there may only be one or two issues that are left in it as I
11 understand it. And my partner, Maureen Mueller, is going to
12 address that. But I believe most of that's been resolved.

01:45:22

13 MR. FARINA: I think Your Honor has it right. I
14 think we should just march through them and the parties can
15 provide the information to the Court as to what, if anything,
16 still remains.

17 THE COURT: All right.

01:45:32

18 MR. DOWD: I guess the only other suggestion I would
19 have, Your Honor, is -- I don't know if the Court had wanted
20 to address some of the issues like the verdict form at this
21 stage or whether that's something the Court wanted to do later
22 as to -- that's something that could be probably moved back.
23 But that's my only thought in terms of --

01:46:03

24 THE COURT: Let me tender a couple of documents.
25 Here's a copy for the parties of the proposed instruction in

1 lieu of plaintiffs' jury instruction No. 18.

2 And here are multiple copies of a suggested or
3 proposed verdict form.

4 (Tendered.)

01:47:35

5 THE COURT: And we'll talk about those things as we
6 get to them and the parties will have a little bit of time at
7 least to peruse. Both of those documents are efforts to find
8 a middle ground between what the parties have suggested.

01:48:10

9 All right, let's go to plaintiffs' motion in limine
10 No. 3. And, counsels, you were about to say last week for the
11 record?

12 MS. MUELLER: Good afternoon. Maureen Mueller on
13 behalf of plaintiffs.

01:48:23

14 I think at this point, Your Honor, given that the
15 parties have reached an agreement on the scope of some of the
16 other evidence, there's really just only one issue remaining
17 in plaintiffs' motion in limine No. 3. And this is evidence
18 regarding a settlement between Lexecon and a firm called
19 Milberg Weiss. And defendants have said that they may

01:48:37

20 potentially seek to introduce evidence of the settlements in
21 the event that the Court allows plaintiffs to introduce
22 evidence of the accolades defendants' prior counsel bestowed
23 on Fischel at the last trial and the fact that defendants
24 tried to hire Professor Fischel. That's the subject of
01:48:56 25 defendants' motion in limine No. 4, which we've opposed.

1 THE COURT: So what's the relationship between the
2 two? My inclination is to grant the motion to bar both;
3 counsel's complimentary questions, as well as the fact that
4 defense wanted to hire Fischel. So if that's the case, if
01:49:13 5 that is kept out, then what happens to the Lexecon and Milberg
6 Weiss settlement?

7 MS. MUELLER: Sure. My counsel is going to be
8 addressing defendants' motion in limine No. 4. But
9 plaintiffs' position is that even if that motion were denied,
01:49:30 10 evidence regarding settlement between Lexecon and the Milberg
11 Weiss firm is not relevant to any of the issues that will be
12 retried. Defendants say it's relevant to establish bias.

13 But, again, even if the motion in limine No. 4 is
14 denied, we think it has no place in this courtroom in the
01:49:49 15 retrial. There's a couple of inaccuracies in defendants'
16 characterization of that settlement. First, the Milberg Weiss
17 firm no longer represents plaintiffs in this case and hasn't
18 since 2004. Lexecon didn't settle with the firm that
19 represents plaintiffs in this case. And so really it's clear
01:50:05 20 that the only purpose of this evidence, Your Honor, is an
21 attempt to prejudice plaintiffs and plaintiffs' counsel in
22 this particular case.

23 You know, the argument with respect to bias, it
24 honestly just doesn't make sense because, if anything, a
01:50:21 25 settlement between Lexecon and the Milberg Weiss firm would

1 demonstrate bias against that firm, not bias in its favor.

2 THE COURT: This was three years before this case was
3 filed, wasn't it?

4 MS. MUELLER: I think that the Lexecon/Milberg Weiss
01:50:35 5 settlement is a 20-year old case is my understanding. So
6 evidence about that 20-year old case, as I said, is clearly
7 intended just to prejudice plaintiffs and the class and
8 plaintiffs' attorneys in this case. It has no relevance of
9 demonstrating bias. There's no probative value. And even if
01:50:51 10 there was some limited probative value, it's substantially
11 outweighed by unfair prejudice to plaintiffs. This evidence
12 was actually barred at the last trial. And counsel for
13 defendants should be instructed not to raise the issue in
14 front of the jury again in this trial.

01:51:09 15 THE COURT: Thank you.

16 Counsel?

17 MS. MacDONALD: Good afternoon, Your Honor. Amanda
18 MacDonald for the defendants.

19 We agree with your instincts, Your Honor, that
01:51:15 20 neither this nor counsel's comments about Professor Fischel
21 belong in the record and belong in front of the jury. We
22 think neither has any relevance whatsoever. However,
23 obviously we reserve the position, which is that if theirs
24 comes in -- if they are able to stand up and talk about what
01:51:32 25 defense counsel said in his examination of Professor Fischel,

1 which has been mischaracterized but we'll discuss it later,
2 and the fact that counsel reached out to Professor Fischel
3 merely to clear conflicts, if they're allowed to inject that
4 into the settlement, they are putting squarely at issue why
01:51:47 5 Professor Fischel has been retained and why he was retained by
6 plaintiffs and why he chose to work for plaintiffs. If that
7 is the case -- and that was not at issue in the first trial;
8 it is now squarely at issue. And for that reason, we believe
9 that if it is allowed to come in over our objection, we think
01:52:02 10 it only fair that we be permitted to inform the jury about the
11 settlement.

12 To the extent that the bias goes the other way,
13 respectfully we disagree; but, in any event, that's something
14 for the jury to decide. We just don't think it's -- it's
01:52:15 15 irrelevant as they say.

16 THE COURT: So as to plaintiffs' No. 3, the only part
17 that I am ruling on is the motion to bar evidence of the
18 settlement. And that motion is going to be granted. I do
19 believe that it does have some probative value. But I think
01:52:32 20 that under 403, it is appropriate to bar that and exclude that
21 from the evidence. And that was -- I'm being told -- and that
22 does sound correct -- that it did not come in at the last
23 trial?

24 MS. MUELLER: That's correct. And that's docket
01:52:49 25 No. 1505.

1 THE COURT: So that motion is granted.

2 MS. MacDONALD: Your Honor, one other point that I
3 believe we have not worked out on that motion is the issue of
4 communication with witnesses. I believe -- correct me if I'm
01:53:00 5 wrong -- that plaintiffs' position is that counsel cannot
6 communicate with the witness the entire time they're on the
7 stand; whereas, what we had put in our papers, which we
8 submitted is the more regular practice, which is that --

9 THE COURT: The parties -- I'm sorry. The parties
01:53:13 10 have worked out many more complicated issues, much more
11 complicated than this. I'm going to ask the parties to get
12 together and decide here -- the parties are very close to
13 being on the same page and I'm going to ask you to --

14 MS. MacDONALD: Okay.

01:53:26 15 THE COURT: -- confer again on that issue and come up
16 with an agreement as, again, the parties are very close in
17 terms of their positions. We're talking about motions to
18 exclude and what contact counsels can have with witnesses,
19 both expert and non-expert.

01:53:45 20 MS. MacDONALD: Yes.

21 THE COURT: So I have no doubt the parties will be
22 able to come to an agreement there. And it is a somewhat
23 minor issue.

24 Next we go to 4 and --

01:53:57 25 MR. FITZGERALD: Good afternoon, Your Honor.

1 THE COURT: Mr. Fitzgerald.

2 MR. BROOKS: Good afternoon, Your Honor.

3 THE COURT: Good afternoon.

4 MR. BROOKS: So motion in limine No. 4, Judge, is in

01:54:07

5 some ways corollary to our Daubert motion. There are some
6 differences. The first part of motion in limine No. 4 asks
7 the Court to exclude testimony or evidence concerning
8 allegedly company-specific, non-fraud information that
9 purportedly distorted Professor Fischel's leakage and specific

01:54:29

10 disclosures models. My hunch, Your Honor, is that that's
11 covered by the Court's Daubert order, even though there are
12 some differences. But I'm happy to argue it if it's not.

13 MR. FITZGERALD: And, Your Honor, I think I share
14 Mr. Luke's hunch. And we think it should come out the same
01:54:47 15 way Your Honor's ruling on the Daubert motion came out and
16 that you should deny that relief.

17 THE COURT: I agree. Over objection, obviously, that
18 is denied, the first part of plaintiffs' fourth motion in
19 limine.

01:55:00

20 MR. BROOKS: The second portion has not been
21 resolved, Your Honor. It's to exclude testimony or argument
22 that Professor Fischel's leakage model was not a valid method
23 for quantifying artificial inflation. This motion is based on
24 challenges that were made, both in the district court at trial
01:55:20 25 and some of them were made on appeal and rejected and others

1 were not made on appeal and therefore waived.

2 So there are four categories basically; that the
3 leakage model does not comport with academic literature; that
4 it violates accepted economic standards; that it improperly
01:55:42 5 includes net inflation from both the days on which there was
6 no statistically significant stock price decline and days on
7 which there were; and that it uses the wrong peer index.

8 And all of those issues, Your Honor, were either
9 litigated before the jury or presented to the Seventh Circuit.

01:55:58 10 For example, the peer group issue was litigated in front of
11 the jury the first time and was not the basis for their
12 appeal. The Seventh Circuit law is clear that having not
13 raised it on appeal, they can't raise it back on the remand on
14 a different issue. And as the Court knows, the remand was on
01:56:16 15 the issue of company-specific, non-fraud information; and they
16 did not challenge the peer groups on the appeal.

17 The same is true for the violation of economic
18 standards, or similar. They criticized Professor Fischel's
19 reliance at the first trial on the leakage model. They also
01:56:35 20 submitted Professor Cornell's declaration to the Seventh
21 Circuit and argued expressly to the Seventh Circuit that
22 Professor Fischel's model did not comport with accepted
23 economic standards. And that argument too was rejected by the
24 Seventh Circuit.

01:56:54 25 The same as -- you know, does not comport with

1 academic literature is very similar, Your Honor. So these
2 propositions, which they have experts planning to testify
3 about, should not be in play under the law of the case. We
4 cited the Heller case, Judge, where, you know, there was an
01:57:16 5 appeal; issues weren't raised; there was a remand. And on
6 remand, the district court and the finder of fact is not
7 permitted to address those issues because that was not the
8 basis for the remand.

9 So that's the gist of it, Your Honor.

01:57:32 10 THE COURT: So, counsel, what is fair game then?
11 They can inquire about whether it does adequately quantify
12 inflation because it does not adequately account for the
13 impact of company-specific, non-fraud disclosure? That
14 obviously is fair game?

01:57:58 15 MR. BROOKS: That's fair, Your Honor.

16 THE COURT: And, again, give me the argument on the
17 wrong peer index.

18 MR. BROOKS: Well, the wrong peer index, Judge, was
19 something that Dr. Bajaj raised in his prior trial testimony.
01:58:10 20 And I don't believe that they appealed on the peer index, Your
21 Honor. They may have appealed indirectly on that issue, in
22 sort of encompassing that in their argument that the leakage
23 model itself should be rejected. But they never criticized
24 the peer index itself to the Seventh Circuit.

01:58:26 25 And the Seventh Circuit upheld the model. It said,

1 essentially, the model works to account for a company -- or
2 for industry and market factors, but it only goes so far. And
3 in combination with the model, you need an economic expert to
4 apply his expertise -- in this case it was Professor
01:58:47 5 Fischel -- to account for company-specific, non-fraud
6 information. And the court held he didn't do it well enough
7 or he didn't explain enough to the first jury. And that was
8 the purpose of the remand.

9 But the peer index and the peer group had nothing to
01:59:01 10 do with that appeal. If it did, Judge, it was implicitly
11 rejected, as the Court I think found on Wednesday, by the
12 Seventh Circuit's finding that the regression accounted for
13 market and industry factors.

14 So either way, either they raised it and it was
01:59:19 15 rejected or they didn't raise it and it was waived, but for
16 this trial, it's off the table.

17 MR. FITZGERALD: And, Your Honor, I think we couldn't
18 disagree more. In effect, the plaintiffs are seeking a
19 directed verdict. Let me look at the legal issue first.

01:59:33 20 As is made clear in Manpower, the decision as to
21 whether an index appropriately accounts for the relevant
22 information is a jury question. You can't appeal -- we didn't
23 appeal as a matter of law. We're not saying to the Court that
24 because Professor Fischel used two particular indices, his
01:59:48 25 models should be thrown out as a matter of law. But the

1 Seventh Circuit remanded on the issue of loss causation. They
2 said it three times, the issue of loss causation goes back.
3 Jury -- whatever the jury found gets redone. It's a matter of
4 fact whether or not the jury believes that the plaintiffs meet
02:00:07 5 their burden of showing that Professor Fischel's model
6 appropriately calculates inflation. To say that we can't
7 challenge that is to direct a verdict in this case. And I
8 think -- so that's the first point, Your Honor.

9 We cannot have waived something we challenged on
02:00:27 10 appeal. The fact when a court reverses and says go back for a
11 new trial, you don't waive factual issues. We're going back
12 and trying the factual issue, whether or not Professor
13 Fischel's model accurately accounts for inflation.

14 I think, Your Honor, there's also a separate
02:00:39 15 confusion here about what firm specific means. But maybe we
16 can address the first issue first.

17 This is not law of the case, Your Honor. If there
18 was a bank robbery and the case was sent back to the Court,
19 the fact that someone didn't appeal the identification of a
02:00:52 20 witness by a teller at the bank saying that's "the person"
21 doesn't mean it goes back to that Court to try with an
22 instruction to the jury that they should assume that the
23 eyewitness ID was correct.

24 We challenged the appeal. The Seventh Circuit sent
02:01:04 25 it back on the entire issue of loss causation. The separate

1 issue of what Your Honor should do as a predicate for Daubert
2 to satisfy yourself doesn't change the fact that before the
3 jury loss causation is an issue and, under Manpower, the
4 selection of the appropriate indexes is for the jury to
5 decide.

02:01:21

6 MR. BROOKS: Your Honor -- and I'm quoting from U.S.
7 v. Husband. There are two major limitations on the scope of a
8 remand. First, any issue that could have been but was not
9 raised on appeal is waived and, thus, not remanded. Second,
10 any issue conclusively decided by this court on the first
11 appeal is not remanded. To determine whether an issue falls
12 within the second limitation, the opinion needs to be looked
13 at as a whole. The court may explicitly remand certain issues
14 exclusive of all others. But the same result may also be
15 accomplished implicitly.

02:01:59

16 So it's not a foregone conclusion that if a bank
17 robbery is remanded that the entire case is remanded. I
18 mean -- and this goes a little bit to their motion for
19 reconsideration. But they cite these cases and --

02:02:12

20 THE COURT: That's what I was just looking at.

21 MR. BROOKS: They cite these cases in their motion
22 for reconsideration, Your Honor, where the remand is -- and
23 let me just turn to it.

02:02:39

24 Where essentially, Your Honor, the court has said --
25 and I think it's the Hills case that they cited -- where the

1 court said this entire case and everything about it is being
2 remanded. And that's very, very different from what happened
3 in this case.

4 In this case, the court expressly rejected the broad
02:02:57 5 challenges to the loss causation element. And it remanded on
6 the specific issue of whether company-specific, non-fraud
7 information could be accounted for by Professor Fischel
8 outside of his model. That's the specific issue.

9 And, again, it's not a directed verdict. We still
02:03:18 10 have to convince the jury that Professor Fischel has
11 established that the fraud in this case was a substantial
12 cause of the stock price decline. But they -- as the Court
13 knows, they don't have any information, any company-specific,
14 non-fraud information to show to the jury. They don't have
02:03:37 15 it. They're going to try to put something on; and to the
16 extent that they're allowed, I guess that will be what they
17 do. But they specifically scored a remand in this case on
18 that issue, and now we're back down and they don't have it.

19 So now they want to challenge his peer group. Now they want
02:03:54 20 to challenge his ability to rely on a leakage model under the
21 academic literature. They want to make all these challenges
22 that were either raised and tried to a jury and the jury made
23 a decision and it was either not appealed or it was rejected.
24 And either way, it's not appropriate to get into on remand.

02:04:12 25 THE COURT: All right, gentlemen, based upon the fact

1 that the motion to reconsider deals with a similar or related
2 issue and the fact that I'm going to consider that motion and
3 a response to the motion -- has the plaintiff had time to
4 think about how much time they are requesting?

02:04:26

5 MR. BROOKS: I think we'd like until next Monday,
6 Your Honor.

7 MR. STOLL: And, Your Honor, may we have an
8 opportunity to reply? And I think it would benefit the Court.

02:04:49

9 THE COURT: That is going to have to move us up, Mr.
10 Brooks, to Friday, the 27th, for a response and Tuesday, the
11 31st --

12 MR. STOLL: Yes, Your Honor, that works.

13 THE COURT: -- for a reply. Okay.

02:05:01

14 Anything else on the fourth motion in limine that's
15 going to be entered and continued?

16 MR. BROOKS: There is, Judge.

17 MR. FITZGERALD: If I could just -- I'm sorry.

02:05:12

18 There's a separate aspect I wanted to address with regard to
19 just the contention that I think we should put on the table
20 that this was remanded solely for people to address
21 company-specific information. I think this is important.

02:05:30

22 What I would like to point out is in the Glickenhau
23 appeal at page 20, the Seventh Circuit said that plaintiffs in
24 security fraud cases need to isolate the extent to which a
25 decline in the stock price is due to fraud-related corrective

1 disclosures and not other factors.

2 To me it's a very clear reading that they're sending
3 back to separate out fraud from non-fraud. And it doesn't
4 require it to be firm specific. And I want to point out three
02:05:46 5 things in that regard.

6 First, it's just a simple matter of logic. We're
7 supposed to -- Household is liable for any inflation caused by
8 the fraud and not for inflation caused by other factors. And
9 if you think of a simple example, Your Honor, if there was an
02:05:59 10 industry with ten widget companies and you would back out of
11 any drop in the stock price what happened in the overall
12 market, which we all agree; you would back out of that
13 anything that happened to the entire widget industry. If
14 Congress put a tax on the widget industry, it would all drop.

02:06:16 15 What the plaintiffs would like Your Honor to believe
16 is that once you account for the market generally and the
17 industry generally, then the only thing left is something that
18 I would call unique to the company; they lose a patent, the
19 CEO gets sick or quits. And that's not the case. And I'll
02:06:32 20 give you an example and then I'll show you why Professor
21 Fischel agrees and why the Seventh Circuit gave us similar
22 indication.

23 What if, of the ten widget companies, one of them
24 powered its factory on coal and something happened that coal
02:06:46 25 became more expensive or there was a fine or a tax for using

1 coal. That would not be fraud information. And to the extent
2 that the stock price fell because their factory was dependent
3 on using coal, which is more expensive, that should be backed
4 out of the calculation of inflation because it's not fraud
5 related.

02:07:01

6 In the case that the plaintiffs put forward, which is
7 something has to be unique to Household, it would be odd that
8 you would back out the effect of the coal industry -- you
9 know, prices going up -- when there's one company out of ten
10 that uses coal; but suddenly if two out of the ten use coal,
11 it would no longer be unique. And that makes no sense. If
12 the cost of coal is driving the stock price down, it should be
13 backed out whether there's one company or two doing it.

02:07:17

14 And I say that -- and I point out in his own
15 testimony, Professor Fischel has twice confirmed that there
16 could be a firm-specific effect where the information is not
17 unique to the firm.

02:07:33

18 And I'll cite to his deposition testimony from 2008,
19 early on in this, as we know, dated case.

02:07:52

20 Question -- the answer given by Professor Fischel
21 back in 2008 at page 200, line 18, I think going to 201, 17:

22 It is possible that a regulatory change that affects
23 the entire industry could affect one firm, whether Household
24 or any other firm, disproportionately. So even though you
25 control for an industry variable, you still have a firm-

02:08:14

1 specific component to the return. And the answer to that is
2 yes.

3 So there he's saying there could be an industry
4 factor that affects one company more than the others. Clearly
02:08:26 5 not unique and, yet, it has a firm-specific component.

6 This year in 2016 at his deposition, Professor
7 Fischel confirmed that. And in one of his answers to a
8 question that's on the transcript at page 192, he indicated:

9 I would give the same answer; that it's industry-wide
02:08:50 10 information that you're asking me to assume has a
11 disproportionate effect on particular firms. So with respect
12 to those firms, there is a firm-specific effect of
13 industry-wide information.

14 Then Mr. Farina said: Okay. So information that is
02:09:05 15 not firm specific can have a firm-specific effect?

16 Answer: If you're asking me hypothetically, yes,
17 that's certainly possible.

18 Again, saying that the information doesn't have to be
19 unique to Household for it to have a firm-specific effect.

02:09:19 20 And then finally, Your Honor, I would point to the
21 Glickenhauß opinion on page 20. And I know there's a
22 discussion which will be focused on in the motion for
23 reconsideration as to whether or not the language the Seventh
24 Circuit used was a finding or not. And I'll bracket that for
02:09:35 25 the moment.

1 The paragraph before that discussion has language
2 that says, You need to isolate the extent to which a decline
3 in stock price is due to fraud-related corrective disclosures
4 and not other factors. And the case they cite to right there,
5 Hubbard v. BankAtlantic Bancorp, is very telling. In that
6 case, you were considering what happened due to securities
7 fraud by a bank. In that case, the plaintiffs' expert
8 measured the market by using the S&P 500, the same way
9 Professor Fischel and Professor Ferrell measured the larger
10 market, the S&P 500. In that case, the plaintiffs' expert
11 measured the industry by using the NASDAQ bank index, similar
12 to Professor Fischel, as well as Professor Ferrell using the
13 S&P Financials.

14 In that case what was presented to the Eleventh
15 Circuit -- and that case was cited by the Seventh Circuit --
16 was the issue of whether that was good enough. And the jury's
17 verdict was overturned, and the Eleventh Circuit sustained it
18 because that was not good enough because, in that case, the
19 bank was based in Florida and there was a Florida real estate
20 collapse which was disproportional. And the Eleventh Circuit
21 said that isn't good enough; you must account for that
22 information. That information about a Florida real estate
23 collapse was not unique to BankAtlantic. There were other
24 banks in Florida. Lots of people were affected by the
25 collapse. What was relevant was that that collapse affected

1 the stock price and it wasn't captured in the market and
2 industry indexes.

3 So for the Seventh Circuit to cite a case that says
4 you have to separate out fraud from other fraud factors, a
02:11:12 5 case that says you must do it, it's clear error if you ignore
6 this factor, which is not unique to the company. Then to the
7 next paragraph to say we send this back on loss causation,
8 it's quite clear they're not excluding any factor that may
9 affect more companies than Household if it has a specific
02:11:29 10 effect on Household different than the market and industry.

11 So we just want to make clear that we do not think
12 that the test here is whether or not it's unique to Household.
13 The test is whether or not the effect on Household is
14 something that occurred and is different than the general
02:11:44 15 effect of the market and industry.

16 MR. BROOKS: Your Honor, the citation to BankAtlantic
17 Bancorp, which is on page 421 of the public decision,
18 immediately precedes -- there's nothing in between it -- from
19 the Seventh Circuit citation that says, In order to prove loss
02:12:03 20 causation, plaintiffs in securities fraud cases need to
21 isolate the extent to which a decline in a stock price is due
22 to fraud-related corrective disclosures and not other factors.

23 The next sentence is, Fischel's models controlled for
24 market and industry factors and general trends in the economy.
02:12:21 25 The regression analysis took care of that. The court -- they

1 attacked the model and the court found that the model
2 accounted for market and industry factors. It took care of
3 that. The thrust of their appeal was that the model itself
4 can never determine the difference between fraud information
5 and non-fraud information. An economic model just can't do
6 that. An economic expert needs to do that. And so an
7 economic expert needed to take a harder look or explain more
8 about why the -- why that type of information -- information
9 unique to Household, not industry, not market -- impacted his
10 model.

11 And Professor Fischel has taken that look on remand,
12 and he's said there were two dates; they cancel each other
13 out. And none of the other company-specific information
14 impacted his model significantly. And they couldn't present a
15 single day on which that happened, Judge, when they challenged
16 him. And now they want to come in and they want to say, well,
17 it's not unique to Household; we're going to go back and we're
18 going to test the models, that after citing BankAtlantic and
19 making the finding that they're relying on, the court then
20 said had controlled for the other two areas, market and
21 industry -- actually three, and the general economy -- and the
22 only thing that was left was company-specific, non-fraud
23 information.

24 So, Judge, first of all, this was not the thrust of
25 their appeal. It's not something that they appealed directly

1 on. They did challenge the model. The model was upheld as
2 sufficient. It was the model that the jury had based its
3 prior verdict on. And then they remanded on limited issues
4 only.

02:14:05 5 And I read this to the Court last time. I think
6 you're aware of the beginning of the case where they talk
7 about the broad attacks on the model, including this attack
8 under the Williams case where the model had not accounted for
9 company -- or for market and industry factors, which they
02:14:22 10 rejected, along with all the other attacks, except for
11 company-specific -- company-specific information that was
12 non-fraud. And that's what we're back down here to talk
13 about.

14 And they want to blow this thing wide open into a
02:14:37 15 retrial of issues that are long settled because -- and it's --
16 Your Honor, they went up to the Seventh Circuit and they said,
17 this is an issue; this is real. We concede we've never raised
18 a single piece of non-fraud information, but it's his burden
19 to account for it. And they convinced the court to remand on
02:14:58 20 that issue. And Professor Fischel did exactly what they
21 wanted him to do. He did exactly what was ordered. And now
22 they want to move to the side and try this case as though the
23 prior trial never happened and as though this opinion was
24 never written except for the last line. And that's not
02:15:14 25 appropriate, Your Honor.

1 Under the Seventh Circuit law, you have to look --
2 everybody has to look to the entire opinion to determine the
3 mandate. And the entire opinion, read in its completeness,
4 makes very clear that the only thing left on loss causation is
02:15:32 5 whether the model -- or whether Professor Fischel has
6 adequately explained that company-specific, non-fraud
7 information has been accounted for and did not significantly
8 distort his model.

9 If they had company-specific -- they say it's a
02:15:47 10 directed verdict. But that's because they don't have the
11 information that they got the remand on. If they had
12 company-specific, non-fraud information, they would
13 cross-examine him with it. Their experts would be pointing it
14 out. But they don't have it. What they have is information
02:16:02 15 that the court has already looked at that is either fraud
16 related, stale, or industry specific. None of it is company
17 specific. And the information that is company specific is
18 fraud related, Judge.

19 So for them to now come in and challenge the peer
02:16:20 20 group, to challenge his ability to use this model -- which has
21 been affirmed by the Seventh Circuit -- under the academic
22 literature completely blows the entire scope of the Seventh
23 Circuit's opinion away. It erases the entire thing except for
24 what they want, which is, it was remanded.

02:16:38 25 MR. FITZGERALD: Judge, just to be clear, where he

1 started was to say when you read that one sentence that says,
2 you know, the -- due to fraud-related corrective disclosures
3 and not other factors and said it next goes into the sentence
4 that has been the subject of discussion, there was a sentence
02:16:55 5 in between. The sentence in between is, "See Hubbard."
6 Hubbard is the case that says it's erroneous to leave out
7 information that affects a firm differently in the market and
8 industry and the example there is something that is not unique
9 to the firm.

02:17:07 10 There is nothing in the opinion that ever says the
11 information has to be unique. The issue that has sort of
12 plagued this case a bit is the word firm specific doesn't mean
13 unique. And it's an economic term to say when you put
14 something into a model and you run it -- you know, a chart --
02:17:26 15 and say, this is what the price is predicted; the difference
16 between what the firm's price is in that model is the firm-
17 specific component.

18 If you only put two indices in, that component is
19 bigger. If you try and add a third index to make it more
02:17:43 20 accurate, that component is smaller. But there's nothing in
21 the opinion that would change the basic law under Dura, which
22 is, the company is responsible for damages or inflation caused
23 by fraud and not responsible for damages or inflation caused
24 by non-fraud. Nothing ever says that you count non-fraud as
02:18:00 25 fraud if some other company is suffering the same problem.

1 So we do have firm-specific information because when
2 you look at it, firm specific does not require the information
3 to be unique to the company. And that's a critical point to
4 this case because they want to label it, take firm specific
02:18:16 5 and make it unique and then keep our evidence out, which most
6 of our evidence goes to information that is not focused at the
7 general overall market or the general overall industry; but to
8 factors that particularly affected financial institutions like
9 Household that were in the subprime space, just like that bank
02:18:37 10 in Florida that had a particular issue with Florida real
11 estate.

12 So it is firm-specific information, but the jury is
13 not going to be told -- the jury should be told separate out
14 fraud from non-fraud. We're not contesting that Professor
02:18:49 15 Fischel could put his model on and that he can testify; but we
16 should be allowed to challenge it. They have a burden to
17 prove fraud, and we should have every right to prove non-fraud
18 without limitation.

19 THE COURT: All right, I will take it under
02:19:01 20 advisement, even as we get briefing on the motion to
21 reconsider the previous ruling. Mr. Fitzgerald, anything --
22 actual events? You mentioned the crash in Florida. Anything
23 specific here?

24 MR. FITZGERALD: Oh, in this case?

02:19:22 25 THE COURT: Yes. Any factors that --

1 MR. FITZGERALD: There are examples, Your Honor, that
2 we could put forth before Your Honor where there will be
3 examples like a particular credit card company had a bad day
4 and then the analysts say stocks of Household and other
02:19:37 5 companies slid as a result of what happened to this other
6 credit card company. There are days when there are concerns
7 about a double-dip recession and unemployment and because
8 Household lends money to consumers -- and unlike American
9 Express, who probably have a pretty good rate of collecting
02:19:53 10 from folks, Household lent to people who had checkered credit
11 histories and sometimes didn't have the ability to pay. When
12 unemployment rates would come out and they were going up, when
13 fears would be expressed about a double-dip recession, you
14 would see that the companies in the subprime space, their
02:20:11 15 stocks would fall.

16 Similarly, Household, because it wasn't a bank,
17 couldn't just take deposits where people gave them money and
18 lend it out. They had to borrow money on the commercial paper
19 market, et cetera. So sometimes when those factors hit, they
02:20:24 20 hit Household different than they would hit other folks. The
21 S&P Financials Index in the top ten has JPMorgan Chase, AIG,
22 giant insurance companies, giant banks, Merrill Lynch.
23 They're not like Household.

24 And one of the things that we will bring out at trial
02:20:40 25 is there are a number of days where Professor Fischel just

1 looks at the S&P 500 and S&P Financials and not a lot is
2 happening and Household's price changes. And he says, I
3 assume it's fraud. What we say is, no, look at that day. And
4 he realized that something happened in the subprime market;
5 maybe the unemployment went up, maybe consumers got a double-
6 dip when recession went up. In some cases, it was regulations
7 imposed upon credit card companies where the analysts said,
8 all those stock slid because they're worried about what's
9 going to happen in the industry. And then you see the peer
10 group falling at the same time as Household. And that's what
11 we want to present to the jury. We owe money for fraud but
12 there's other things going on that are not fraud that they
13 need to take into account.

14 THE COURT: Mr. Brooks, you think that's already
15 accounted for, taken care of?

16 MR. BROOKS: Your Honor, it has been. It's been
17 decided by the prior jury. It was part of their challenge on
18 appeal. I disagree completely with the characterization of
19 firm specific as including industry information. And we
20 disagree with a lot of what Mr. Fitzgerald has said about the
21 facts of this case. But even if they were right, the
22 defendants -- the Seventh Circuit additionally said the
23 defendants haven't identified any firm-specific, non-fraud-
24 related information that could have significantly distorted
25 the model.

1 In BankAtlantic, the expert admitted at the trial
2 that, in fact, the Florida real estate collapse was not
3 accounted for by her model. There was no such admission at
4 the first trial, and there's no admission here. Has Professor
02:22:18 5 Fischel testified that theoretically there can be a disparate
6 impact? Yes. But it's -- he has not said that in this case.
7 And he's looked at the economic evidence in this case.

8 And, again, what they're trying to do is retry the
9 case that was tried to the first jury. And it was tried to
02:22:33 10 the jury, it was appealed on a specific theory on broad
11 attacks and one narrow attack that they won, and then it was
12 remanded. And so, Your Honor, they cannot come back now and
13 change the definition of firm specific to include some credit
14 card companies and auto companies when Household was a real
02:22:56 15 estate consumer finance company principally and then say
16 that's firm-specific information because Household stock may
17 have moved in sympathy. It doesn't distort the model. They
18 haven't shown that.

19 And all they're doing is introducing an area of
02:23:11 20 confusion into this case that's completely unnecessary. But
21 it's not allowed. That's the point. The point is -- and I
22 don't want to get into the facts here, Judge, because we are
23 not supposed to be looking at those facts. The facts that
24 we're looking at are whether the model or -- and whether
02:23:26 25 Professor Fischel -- excuse me -- it's whether Professor

1 Fischel has accounted for and explained why company-specific,
2 non-fraud information did not significantly distort his model.
3 It really comes down to the fact that they don't have any of
4 that type of information, so they've cleverly now said that --

02:23:45

5 THE COURT: You admit it's clever?

6 MR. BROOKS: As far as it goes, Your Honor.

7 THE COURT: So, Mr. Fitzgerald, if firm specific
8 doesn't mean firm specific, specific to the firm, what does it
9 mean?

02:23:59

10 MR. FITZGERALD: It means -- firm specific means
11 having a firm-specific effect on the firm. And, there,
12 Professor --

13 THE COURT: Firm-specific effect?

02:24:07

14 MR. FITZGERALD: Right. It doesn't have to be unique
15 information. And that's the critical point. And if you read
16 the Hubbard case, the very case they cite, that information
17 about the Florida real estate market was not unique to that
18 bank. What it means -- firm specific means it's not accounted
19 for in the model where they factor in the market and the
20 industry. And Professor Fischel himself said you could have
21 an industry factor that disproportionately affected one
22 company and that will have a firm-specific component.

02:24:22

23 So to twist that from firm specific to mean unique is
24 a way of throwing out our evidence, which I think would
02:24:39 25 deprive us of a fair trial. The Seventh Circuit sent it back

1 for a trial on loss causation. Your Honor already ruled in an
2 earlier decision earlier this year or last year that the scope
3 of the trial is on loss causation. We can't just put -- have
4 them put Professor Fischel up on the stand and say no one is
5 allowed to challenge him and say his model didn't get it right
6 or to put our model forward. The idea is that firm specific
7 means something that affected Household in a way differently
8 than it affected the market and industry --

9 MR. BROOKS: That's --

10 MR. FITZGERALD: -- but not unique to Household.

11 MR. BROOKS: That's their idea, Judge. And I just
12 want to point one thing out because they keep talking about
13 firm-specific effect. The language that the Seventh Circuit
14 uses time and time again is firm-specific, non-fraud-related
15 information. Information is what they're talking about,
16 firm-specific information. This is information about a
17 company that a model cannot account for because a model can't
18 tell the difference between fraud-related information and
19 non-fraud-related information.

20 So they cite BankAtlantic. I agree that the Seventh
21 Circuit cites BankAtlantic. In the next sentence, that's
22 disposed of by the court's observation and conclusion that his
23 models take care of industry, market, and general economic
24 factors. And what's left is firm specific -- not effects but
25 information. That's what the court wrote. They're re-writing

1 what the court wrote to turn firm specific into industry
2 specific and information into effect. Neither of those two
3 things are what the court wrote. The court wrote firm-
4 specific information.

02:26:17 5 MR. FITZGERALD: Your Honor, if I can just add one
6 thing.

7 The court -- I'll be plain. The court used the words
8 firm-specific information and firm-specific factors
9 interchangeably. But the test here is what affected the

02:26:28 10 price. And firm-specific factors are things that could affect

11 Household without it being unique to Household. Professor

12 Fischel himself said there could be a firm-specific effect

13 from things going on in the economy. There is no logical

14 reason nor no language in the opinion that would say something

02:26:46 15 in the economy other than fraud that had an effect on

16 Household's price should not be backed out of the equation

17 simply because Household wasn't the only company that suffered

18 it. That would make no sense. Their language doesn't talk

19 about unique. It does use the word firm specific. They go

02:27:03 20 back and forth between information and factors. But Fischel

21 himself admits that an industry-wide factor could have a

22 firm-specific effect. And we're here talking about the effect

23 of the fraud on the price and the effect of the non-fraud on

24 the price. And we have to be able to present that to the

02:27:18 25 jury.

1 MR. BROOKS: And --

2 THE COURT: Mr. Brooks, let's move on. That is under
3 advisement.

02:27:26

4 MR. BROOKS: Thank you, Judge. There is another
5 component to this motion in limine, Your Honor. I think we
6 addressed the Institutional Investor magazine, and we're going
7 to re-depose Professor Ferrell on that.

8 THE COURT: All right, so I'll say the third portion,
9 third part of the motion is moot.

02:27:40

10 MR. BROOKS: No, it's not -- well, Judge, that part
11 of it is. But then there are a number of exhibits on their
12 exhibit list that it appears they intend -- they didn't at
13 least disclaim this -- to use with experts that were either
14 not in their reports or even in their reliance materials,
15 Judge. And we moved to exclude that information.

02:27:55

16 MR. FITZGERALD: Could I make a suggestion? In light
17 of everything that took place this morning, could we take that
18 up offline just to see if we're still in disagreement? I know
19 there's a number of exhibits we put on our reports, et cetera.
20 There might be some exhibits we can whittle out.

02:28:11

21 MR. BROOKS: Sure.

22 THE COURT: That's also part of the third portion of
23 that motion in limine.

24 MR. FITZGERALD: And I believe the fourth portion is
25 moot because it talks about the cumulative effect of

02:28:20

1 testimony, and we've reached a stipulation.

2 THE COURT: That's correct. So we go to the fifth
3 motion in limine, plaintiffs' fifth. The first part of that
4 motion in limine is regarding verdict forms.

02:28:36

5 MR. STOLL: Yes, Your Honor. If I could briefly,
6 before we begin that.

02:28:50

7 I know Your Honor withheld the other matter with
8 regard to briefing. And all I wanted to indicate to the Court
9 was, we do view this issue regarding the very specific scope
10 of the mandate and findings embedded therein to be a very
11 fundamental issue that -- no one wants to try this case a
12 third time. And so, Your Honor, the only thing I would invite
13 is after the briefing, because I know all the parties are
14 present here in Chicago, if oral argument on that matter would
15 benefit the Court after the briefing, we think that would be
16 beneficial because that -- this is at the absolute core of
17 what is being tried before this jury, which is, what is fraud
18 and what is non-fraud and the instructions that they'll be
19 given.

02:29:10

02:29:29

20 I would respectfully submit to the Court that
21 construing the mandate in a manner other than a retrial of
22 loss causation and inconsistent with Manpower would inject
23 error. And I don't want to reargue it now, Your Honor. The
24 only thing I was saying was, this is of such import that if we
25 could, after the briefing, have oral argument on -- and

02:29:49

1 obviously at Your Honor's discretion, I think that would be
2 important with such a fundamental issue.

3 And with that, Your Honor, we can return to MIL 5.

02:30:03 4 MR. BROOKS: That's fine, Judge. I mean, I feel like
5 we've argued this a few times now. But we're happy to
6 schedule an argument for the motion for reconsideration.

7 MR. STOLL: And one issue, Your Honor, with regard
8 to --

02:30:13 9 THE COURT: I'll just insert the word brief; brief
10 argument. After I've considered the briefs, then I will allow
11 brief argument on these two issues, which are related.

12 MR. STOLL: Thank you, Your Honor.

13 And with regard to MIL 5, I would just point out,
14 Your Honor, this goes directly to the verdict form which Your
02:30:31 15 Honor handed out. From the defense perspective, we don't
16 believe there's any argument necessary. We have no objection
17 to the verdict form that you handed out. The only
18 modification would be that question No. 3 is no longer needed
19 because of the agreement that allocation is out.

02:31:13 20 MR. BURKHOLZ: Your Honor, Spence Burkholz for the
21 plaintiffs.

22 We have the Court's handout. And we obviously take a
23 different position on this. Normally this is something that
24 we discuss later in the proceedings. We raised this issue in
02:31:28 25 a motion in limine to flag it for Your Honor. We would like

1 to have some time to look at the Court's proposed jury
2 instruction. But I would like to make a few comments on the
3 verdict form.

4 THE COURT: Yes.

02:31:39

5 MR. BURKHOLZ: Your Honor, the jury -- we think the
6 question that is in our verdict form is sufficient for
7 causation and that the jury, like in the first trial, can
8 simply, if they find causation from the statements, fill out
9 the inflation on the verdict form; and if they find no
10 inflation from the first statement, they would just put zero
11 for the first three days. And then for the second statement,
12 March 28th, if they find inflation from that statement, they
13 would put in the inflation from that, according to the model
14 that they choose.

02:32:15

15 They did this in the first trial, and the Seventh
16 Circuit said they did it perfectly. They found no liability
17 for the first 14 statements. And then -- and this was against
18 the defendants' objection -- they filled in the verdict form
19 with the inflation from the first statement.

02:32:30

20 And with this -- the way it's set up now, really all
21 they need -- and as the Seventh Circuit said, all they need to
22 show -- they put in the inflation from March 28th, the full
23 inflation. Every subsequent statement after that simply
24 maintains the inflation. So -- and the Seventh Circuit
25 endorsed that concept, which is what Professor Fischel

02:32:53

1 testified to, again, against arguments from the defendants.

2 So if we give this to the jury -- and they might be
3 confused -- and let's say they did fill out "no" for statement
4 No. 9. Well, it really would have no impact, just like the
5 statements that the prior jury rejected within this time
6 period after March 23rd. The defendants raised that issue on
7 appeal and said, well, the leakage model can't work because
8 you have rejected statements after the first false statement.
9 And the Seventh Circuit said, no, that's a misunderstanding of
10 the way the leakage model works. The full inflation is in the
11 stock from the first statement.

12 Now, there was this issue of the first three days and
13 the first statement only applying to predatory lending. But
14 they sent it back on these two limited issues, one that we
15 talked about before, and the second one was he would have to
16 allocate the first three days. And then after March 28th, the
17 full inflation is in the stock price, the \$23, if they accept
18 the leakage model, from that day until the end. What takes
19 the inflation out is the later corrective disclosures, the
20 leakage, starting on November 14th, November 15th, 2001. That
21 takes the inflation out.

22 These later statements are not -- had nothing to do
23 with taking the inflation out of the stock price. And, again,
24 any of these subsequent statements, even if it was set up this
25 way, which we don't think is appropriate, if the jury found

1 "no," that doesn't mean that the inflation still wouldn't be
2 in the stock price from the prior statement. These subsequent
3 statements have -- really don't impact once the full inflation
4 is in there really from the second statement.

02:34:53

5 So we think a better approach is the question 1: Did
6 their statements cause damages? And, if so, then the jury
7 fills out the inflation table. And they will make a
8 determination as to whether or not -- when the causation
9 starts.

02:34:54

10 And then just a couple of other comments on the
11 question No. 2, the models that we're going to submit to the
12 jury. We think it's only appropriate for the plaintiffs'
13 specific disclosure model, the leakage model. And then we do
14 believe that the jury should be given the option of estimating
15 damages based on the evidence that's presented. We think
16 there's case law to support that, as long as it's reasonable
17 based on the evidence. So we think that should be an option.
18 I understand Your Honor's decision not to include that.

02:35:12

19 And then finally --

02:35:28

20 THE COURT: I should say that in the instruction I
21 tendered to the parties today, I included the defendants'
22 specific disclosures models. But I understand that we still
23 have to talk about that. And I just put that in there. It
24 doesn't mean that I have decided that that's appropriate.

02:35:44

25 MR. BURKHOLZ: Right. And I think for that

1 particular model -- I think, Your Honor, we'll submit this
2 verdict form obviously when the case is done. But we think
3 there's real problems with that model with respect to the
4 first eight months of the class period.

02:36:00 5 The only -- he didn't follow what the Seventh Circuit
6 said what Professor Fischel should do for the first three days
7 in the class period. He doesn't have any -- frankly, he
8 doesn't have any inflation for that first eight-month period.

02:36:16 9 And the \$4 of inflation that he's kind enough to give the
10 plaintiff class as a maximum includes the three theories, the
11 disclosures relating to the three theories. So he's got to
12 really do what the Seventh Circuit said he had to do for the
13 first three days of the class period. And then really you
14 can't submit a model that doesn't have inflation numbers for
02:36:35 15 the first eight months. He said he wasn't going to do it. He
16 said he needed to do more. He intentionally didn't do the
17 analysis. He thought it was just Professor Fischel's
18 obligation to do it.

02:36:49 19 You can't -- under the ATA case from the Seventh
20 Circuit, you can't present a flawed damages model to the jury.
21 So I guess we'll wait and see how that comes out since you're
22 going to allow him to testify. But just keep that in mind as
23 you see the testimony, that we're going to object to the jury
24 having that as a choice at the end of the day.

02:37:02 25 THE COURT: Mr. Burkholz, we are there. That's the

1 next part of this same motion in limine, correct?

2 MR. BURKHOLZ: Correct.

3 MR. STOLL: Your Honor, may I briefly respond, Your
4 Honor?

5 THE COURT: Yes.

6 MR. STOLL: So, Your Honor, your proposed verdict
7 form has it exactly correct. First of all, with regard to the
8 issue about whether or not you need to identify loss causation
9 with each statement, Judge Guzman, in fact, required that.
02:37:26 10 I'll direct your attention to transcript page 4365. The prior
11 verdict instructions made that clear. Plaintiffs must prove
12 that the defendants' particular statement or omission was a
13 substantial cause. I direct your attention to docket 1614 at
14 page 32.

02:37:43 15 So the loss causation instruction required it. The
16 jurors, in fact, had to go through, as Your Honor knows,
17 statement by statement to determine that the requisite
18 elements to sustain the 10b-5 claim had been met as to each
19 statement. Loss causation is an essential element that must
02:38:02 20 be found as to each purported misrepresentation. And that
21 issue has been remanded for retrial.

22 I would also -- as I'm sure Your Honor is aware --
23 the PSLRA requires that. It expressly says the plaintiff
24 shall have the burden of proving that, the act or omission.

02:38:21 25 And then, of course, Dura also comments, Your Honor,

1 at 544 U.S. at 345, that the statute insists that securities
2 fraud complaints specify each misleading statement. And the
3 statute expressly imposes on plaintiffs the burden of proving
4 that the defendants' misrepresentations caused the loss.

02:38:43

5 So the specificity, Your Honor, is absolutely
6 required. You have that correct. It also goes, for instance,
7 to someone like defendant Gilmer as to whether or not
8 liability can even be imposed because he's only on the first
9 statement.

02:38:57

10 With regard to the issue of --

11 THE COURT: The first section of No. 5, plaintiffs'
12 No. 5, is going to be denied for the reasons stated by
13 Mr. Stoll, including the language of the statute and Dura.
14 And it's also consistent with Judge Guzman's approach during
15 the first trial.

02:39:37

16 As to the second portion, let me start again with the
17 plaintiff and trying to understand exactly --

18 MR. BURKHOLZ: Yes, Your Honor.

19 THE COURT: -- what the objection is. Is the
20 plaintiffs' position that he simply didn't do the work and
21 that that in and of itself is fatal to the model? Or are you
22 saying that even if you accept -- I understand that your
23 position is that his model is flawed -- but if you accept his
24 model, does that get us to the \$4.19 cap?

02:39:37

02:39:59

25 MR. BURKHOLZ: A couple of responses. First, with

1 all due respect, Your Honor, with respect to the verdict form,
2 we just want to put on the record that we object to the
3 Court's rulings. Thank you.

4 With respect to Professor Ferrell's specific
02:40:13 5 disclosure model, he didn't present a proper methodology
6 that's required to submit it to the jury. What he did was he
7 presented some kind of corrected -- he referred to corrected
8 model to the Fischel model. And he went ahead and put in a
9 regression analysis. And he had his results, found certain
02:40:37 10 dates were not statistically significant because he changed
11 some of the parameters. And he went ahead and said, okay, I'm
12 going to look at the dates that are now not statistically --
13 that are statistically significant. He threw some out
14 improperly. And then on the six dates that he came up with,
02:40:53 15 he said, well, four of them have confounding information; so
16 you really shouldn't include those four; and if you don't,
17 then you're left with the first corrective disclosure on
18 November 15th, and the October 10th, the second to last one,
19 which the increase is greater than the decline. So basically
02:41:10 20 plaintiffs have no damages. That's what they're going to
21 argue to the jury.

22 But then he says -- you know, he realizes that's
23 nonsensical. So he says, okay, I'll have this model where
24 I'll take the six disclosures, I'll give you credit for these
02:41:23 25 four, even though I think they're confounded, and when I do

1 the calculations, it's actually -- I think it's five -- yes,
2 six total, I will give the plaintiffs credit for that; and
3 we'll start not at the beginning of the class period, but on
4 November 15th, I'll give them \$4.19 on that day; and then
5 after that day, I'll start dropping down the inflation.

6 As for the time period before then, from the first
7 eight months of the class period, he has nothing in his model.
8 Now they say, well, he's going to come back and say he has
9 \$4.19 from the beginning, the first day, March 23rd, through
10 eight months to the first corrective disclosure.

11 Well, if he does that, that violates what the Seventh
12 Circuit said Professor Fischel had to do for the first
13 statement on March 23rd. They said, well, that one only
14 applies to predatory lending, so come up with some kind of
15 estimate for the first three days. A minimum estimate is what
16 he did. It's much more than that. And he says it's \$3.18 for
17 that day at a minimum but probably more. And then the second
18 day, you have the full inflation, the second statement on
19 until the first corrective disclosure eight months later.

20 Their expert hasn't even done that. And so because
21 he hasn't done that, he doesn't have a proper methodology in
22 his model to present to the jury with respect to this
23 regression analysis and inflation calculation, because he
24 hasn't even done what the Seventh Circuit said you're required
25 to do in this case.

1 And just, finally, he admitted he needed to do more
2 and he said he intentionally didn't do the analysis. And
3 those -- that citation is in our briefs.

02:43:09 4 MR. STOLL: Your Honor, again, you have question
5 No. 2 exactly right in terms of what you've presented.

6 There are two aspects to it, which were in dispute,
7 both of which you have correct. The first was the plaintiffs'
8 model had suggested that the jury could pick anything they
9 wanted, which, of course, would be incorrect.

02:43:26 10 And, Your Honor, I just wanted to provide to the
11 Court a transcript, which both parties acknowledge is a
12 transcript from the Seventh Circuit oral argument. If I could
13 tender that to Your Honor.

14 (Tendered.)

02:43:40 15 MR. STOLL: And you'll note that during the course of
16 the oral argument -- and if I could direct your attention,
17 Your Honor, to pages 18 to 19. This particular issue came up
18 during oral argument regarding whether or not it would have
19 been appropriate for the jurors to pick any reasonable amount
02:44:02 20 that they thought appropriate or whether they were tied to one
21 of the experts' analyses.

22 And you'll see that Judge Kanne says: Getting back
23 to -- said they had three alternatives; what were the other
24 two? And Mr. Dowd responds. And the last thing he says is
02:44:23 25 that Judge Guzman decided to give all three. You have to pick

1 between these three. You can't just put in any number you
2 want.

3 And Judge Sykes commented: I'm glad about that.

4 Mr. Dowd said: I understand, Your Honor.

02:44:34

5 And Judge Sykes says: That would have been really
6 speculative.

7 And there was a bit of interruption.

8 And then Judge Sykes again says that -- after
9 Mr. Dowd says: The reasonable estimate of damages, I think
10 you can tell a jury that in some cases, precisely what
11 Mr. Burkholz was representing to you.

02:44:47

12 And Judge Sykes says: Not in a case like this. I
13 mean, you have to have some expert support for the numbers on
14 a case like this.

02:45:00

15 MR. BURKHOLZ: And my --

16 MR. STOLL: So it is correct, Your Honor, that first
17 of all -- and Judge Guzman had appropriately required that.
18 So the manner in which Your Honor is requiring that you select
19 the model or none is exactly correct.

02:45:13

20 With regard to defendants' model, that is based on an
21 appropriate analysis. As Your Honor knows, the inflation is
22 calculated as a consequence of looking at the disclosure
23 period. Professor Ferrell went through and did a rigorous
24 analysis and determined that the maximum amount of inflation
02:45:32 25 that can be ascribed to the fraud during the disclosure

1 period -- putting aside confounding information -- the maximum
2 amount is \$4.19. And what would be submitted to the jury, and
3 as we indicated -- and I think actually Mr. Burkholz has it
4 exactly correct; Your Honor should hear the testimony and then
02:45:51 5 we'll be able to submit this to the jury -- but what he will
6 indicate is 4.19 is the maximum amount. And prior to the
7 disclosure period through the class period, 4.19 is what would
8 be put in for the jury on the table. And we will submit that,
9 Your Honor.

02:46:06 10 So you have the verdict form exactly correct. The
11 only thing that needs to be done is question No. 3 is removed
12 in light of the fact that allocation is no longer in the case.

13 MR. BURKHOLZ: Just a brief response, Your Honor.

14 With respect to the Seventh Circuit comment at the
02:46:22 15 oral argument, I just find it interesting that the defendants
16 don't want anything from the Seventh Circuit opinion to be a
17 finding applied in this case, yet they take a comment by the
18 judge and they want that to be a finding in the case.

19 Now, there are cases that allow the jury to basically
02:46:43 20 estimate damages based on the evidence. We think it's
21 appropriate in this case. And that's -- that would be our
22 position. And we understand Your Honor has rejected that at
23 this time. But we think it's appropriate. And based on --
24 after we put our case in, we would like Your Honor to
02:46:58 25 reconsider that.

1 And, of course, Professor Ferrell's model, we'd like
2 you to look at it after the evidence is in. And we think at
3 that time, you'll see that it won't be appropriate to include
4 it on the verdict form because it really has so many
5 methodological flaws that it violates the Seventh Circuit
6 precedent in the ATA case.

7 MR. STOLL: And, Your Honor, just one last comment
8 with regard to what Mr. Burkholz said.

9 We precisely want the Court to follow what the
10 Seventh Circuit said. The mandate in this case was that there
11 was insufficient evidence presented on loss causation and
12 there's to be a retrial on the element of loss causation. And
13 all defendants are requesting -- and we'll brief this for Your
14 Honor -- is, consistent with Manpower, the opportunity to have
15 a jury properly decide, based on the facts presented, the
16 element of loss causation.

17 Thank you, Your Honor.

18 THE COURT: All right. Thank you.

19 (Brief pause.)

20 THE COURT: Plaintiffs' motion in limine No. 6 speaks
21 to prevent impermissible opinion testimony of the three
22 individual defendants, plus Mr. Ancona and Mr. Streem.

23 MR. DOWD: Your Honor, based on the agreement that we
24 worked out with defendants this morning, the only one of these
25 witnesses who will testify is Mr. Streem. So I'm happy to

1 address it as to Mr. Stroom.

2 First, your Honor, you know, what the defendants say
3 is, well, you know, all of these guys have personal knowledge
4 of factors affecting Household's stock price, and so, you
02:50:59 5 know, they should be able to just give their testimony about
6 that. They -- I think they actually say in their motion their
7 opinions re non-fraud factors affecting Household's stock
8 price would be helpful to the jury. That's exactly how they
9 phrase it.

02:51:16 10 Your Honor, that's not lay opinion testimony. Your
11 thoughts on opinions re non-fraud factors affecting
12 Household's stock price, that is classic expert testimony.

13 Now, your Honor, you can have expert testimony be
14 given by a non-retained expert. It's fine. I mean, they
02:51:37 15 could have done that with one of these guys. But then they
16 have to comply with the rules. Then that testimony is subject
17 to Federal Rule of Evidence 702, where it has to be analyzed.
18 And then secondly, your Honor, it would have to come with a
19 disclosure. And that's the most important part here, your
02:51:55 20 Honor.

21 I mean, if they wanted to offer one of these guys, we
22 could have talked about whether they had, you know, reliable
23 ability to testify to that type of information under 702, and
24 we could have tested that. But more importantly, I would know
02:52:11 25 what they're going to say and right now I don't.

1 And it's expert testimony. There's no question
2 they're trying to hide lay testimony under the guise of -- or
3 hide expert testimony under the guise of lay testimony.

4 And, your Honor, it's interesting. The best case
5 they cite in support of their position is one that was decided
6 before they changed the Federal Rules of Evidence. And they
7 changed the Federal Rules of Evidence because they said people
8 keep trying to offer expert testimony that's, you know -- or
9 offer lay testimony that's really expert testimony and we got
10 to change this.

11 If somebody is giving testimony about specialized
12 knowledge or things that aren't apparent to the ordinary
13 layman, you have to give the other side notice. You have to
14 tell them what you're gonna say and you have to provide them
15 with that information.

16 And so again, your Honor, the issue here is --
17 whether they could have done it with Mr. Stroom or not, I
18 don't know. But the point is they didn't follow the rules
19 that they had to follow. And it's becoming a real issue from
20 our side, your Honor.

21 I mean, last week, you know, we talked about a motion
22 where, you know, they got a guy relying on an Institutional
23 Investor magazine that doesn't appear in his reports, it
24 doesn't appear in his reliance materials. He's talking about
25 academic literature that doesn't appear in his report or his

1 reliance materials. They direct a witness -- an expert
2 witness not to answer questions at a deposition about topics
3 that are covered by his report.

4 And now here we have just another third example of it
02:53:43 5 where, oh, we're gonna just offer expert testimony, we're not
6 gonna disclose it to you, through lay witnesses. It's just
7 not right, your Honor. At a certain point you got to comply
8 with the rules.

9 THE COURT: All right.

02:53:54 10 Ms. MacDonald, that's not what you're going to do
11 through Mr. Stroom?

12 MS. MacDONALD: Not quite, your Honor.

13 Your Honor, Mr. Stroom was the vice president of
14 corporate relations and communications at Household.

02:54:04 15 Everything that he's going to testify to is based on his
16 firsthand personal knowledge of the work that he did at
17 Household. His job was to talk to investors. His job was to
18 talk to analysts. He has personal firsthand knowledge.

19 He's not an expert in layman's clothing, by any
02:54:22 20 means, your Honor. And we submit to you that if you look at
21 the Advisory Committee notes to Rule 701 you'll see exactly
22 the situation we're talking about.

23 This is not a case where we're offering opinion
24 testimony solely because it's within his experience, training
02:54:40 25 or specialized knowledge. Rather, we're offering his

1 testimony that is particularized to him by virtue of his
2 position in the business.

3 I mean, he's the vice president of corporate
4 relations and communications. This is his bailiwick. This is
02:54:54 5 what he was -- this is what he did for his job.

6 THE COURT: All right.

7 Mr. Dowd, the plaintiff has identified a potential
8 problem here. It sounds and reads like you may be right, you
9 may have a problem here. The defense is aware of 701, they're
02:55:09 10 aware of 701(c). So you may be on to something here but,
11 unfortunately, this is too abstract for me to rule.

12 Obviously these are constraints on how these
13 witnesses can testify. And, again, the defense is aware that
14 -- what is not allowed, testimony cannot be based on
02:55:35 15 scientific, technical or other specialized knowledge within
16 the scope of 702.

17 So the motion is going to be denied at this point
18 just because in the abstract I cannot rule and it's not
19 workable. But if there's a violation, I'll hear an objection
02:55:57 20 from the plaintiff and we'll take it from there.

21 MR. DOWD: So, your Honor, can we raise objections,
22 then, I take it, during Mr. Streem's testimony if they try to
23 offer this evidence? Or, for example, now we just heard that
24 he's going to testify to a bunch of hearsay which has nothing
02:56:11 25 to do with lay opinion. That's expert testimony, so we'll be

1 objecting to all that. And that's fine with the Court, I take
2 it?

3 THE COURT: Absolutely.

4 MR. DOWD: Thank you.

02:56:18

5 THE COURT: Next is No. 7, motion to preclude
6 defendant from calling lead counsel.

7 Has this been resolved?

8 MS. MacDONALD: One moment, your Honor.

9 THE COURT: Mr. Dowd, argument?

02:56:31

10 MR. DOWD: Yes, your Honor.

11 This is with respect to one of the three lead
12 plaintiffs in the case, it's Glickenhau & Co. And the
13 defendants would like to call Mr. Glickenhau. I mean,
14 there's a number of problems.

02:56:52

15 First of all, Mr. Glickenhau doesn't live in this
16 jurisdiction. He doesn't have to come to trial under Rule 45.
17 So there's no way that defendants or even this Court, frankly,
18 can compel him to come testify.

02:57:07

19 That said, your Honor, his testimony is completely
20 unnecessary in this trial, to begin with. I mean, assuming
21 that he could come, which he doesn't have to, it's still not
22 testimony that matters.

02:57:26

23 There is no question that in this type of case loss
24 causation is determined on a classwide basis. You don't have
25 to look very far to find that. I mean, I found it right in

1 the Seventh Circuit opinion in this case, in Glickenhau. It
2 said, In Phase I the jury addressed all issues that were
3 appropriate for classwide resolution, and then it lists them:
4 Whether the statements were actionable, whether they were
02:57:44 5 material, who was liable for which, and how much inflation the
6 actionable misrepresentation caused in the stock price.

7 I mean, that's clear -- clearly something that has to
8 be tried on a classwide basis. It was tried on a classwide
9 basis the first time. The Seventh Circuit says it gets tried
02:58:02 10 classwide. And there's just no -- there's no exception to
11 that.

12 So what the defendants tried to do is, they say,
13 well, you know, Fischel talks about, you know, his model is
14 appropriate depends on whether or not investors learned of the
02:58:17 15 fraud through gradual leakage of the information or some other
16 way.

17 Well, Professor Fischel isn't talking about what one
18 individual investor thinks. He's talking about the
19 information that became public in the marketplace that
02:58:30 20 analysts are talking about, that there are news reports about
21 things the company might be saying. That's what he's talking
22 about as leakage. It has nothing to do with what one investor
23 out of 40,000 class members -- how they learned the
24 information. That's completely irrelevant. That's why loss
02:58:48 25 causation is tried on a classwide basis. It has nothing to do

1 with it.

2 It's not like the defendants went out and did a study
3 of all the claims or something like that to try to put
4 something together. It's just, you know, we want to just
02:59:00 5 cherry-pick Mr. Glickenhaus. I mean, that's basically their
6 argument, you know.

7 And Judge Nolan, who was the magistrate judge in this
8 case for a long time, wrote years ago in one of the lower
9 court -- or one of the opinions in this case, she said, The
02:59:14 10 investment behavior of a handful of plaintiffs cannot shed any
11 light on the overall issue of liability.

12 Your Honor, that's why falsity, scienter,
13 materiality, and loss causation are determined on a classwide
14 basis. One investor's views just don't really matter here.

02:59:32 15 And I don't really know what's going on here. Maybe
16 they think Mr. Glickenhaus looked bad in his deposition.
17 Maybe it's some other thing about Mr. Glickenhaus they want to
18 bring up, but it's got nothing to do with Professor Fischel.
19 I mean, they come in and they say in their -- I think their
02:59:47 20 reply, well, we should be able to test Mr. Glickenhaus'
21 credibility. What does that have to do with Professor
22 Fischel's models? It makes no sense.

23 Mr. Glickenhaus has no place in this trial on loss
24 causation, it's that simple, your Honor, even if he could be
03:00:02 25 compelled to come.

1 THE COURT: Ms. MacDonald?

2 MS. MacDONALD: Your Honor, Mr. Glickenhause and
3 Glickenhause & Company, Inc. is the lead plaintiff. That
4 plaintiff was selected by the plaintiffs here. He fought to
03:00:13 5 be the lead plaintiff over others' objections. And he
6 represented to the Court that he would participate in the
7 case, including acknowledging that he may be required to
8 appear as a witness in trial.

9 So with regard to Rule 45, to the extent his
03:00:27 10 testimony is relevant, it would be surprising if he would be
11 unwilling to come, but we could deal with that in some other
12 way.

13 Taking a step back for a moment, Mr. Dowd began the
14 argument by saying that Mr. Glickenhause's testimony is not
03:00:40 15 necessary. Respectfully, that's not the test here. The test
16 here is whether or not his testimony is relevant and
17 probative, and we submit that it is. We did not cherry-pick
18 Mr. Glickenhause. The plaintiffs cherry-picked Mr.
19 Glickenhause.

03:00:53 20 Now, the reason that his testimony is important here,
21 we agree that loss causation is to be determined on a
22 classwide basis. We don't dispute that. That doesn't render
23 the lead plaintiffs' testimony completely irrelevant, your
24 Honor.

03:01:07 25 This is a strange case. Dr. Fischel has put aside

1 the normal way the damages are calculated and has applied a
2 new theory. He -- when we asked him -- you might remember
3 he's presenting two models and the jury is supposed to choose
4 between his two models. And when asked how the jury is
03:01:26 5 supposed to determine which of those two models is the right
6 one, he said, It depends -- if you believe that there's no
7 leakage, then I think one methodology is better than the
8 other. If you believe there is leakage, then the second
9 methodology is preferable.

03:01:39 10 So the question that the jury has to answer -- if
11 they are looking at Dr. Fischel's two models, the question
12 that he will put to them is: Is there leakage or is there not
13 leakage?

14 So our point, and the reason that Mr. Glickenhau's
03:01:53 15 testimony is relevant, is that we are entitled to test whether
16 -- Dr. Fischel's observations about what the market thought,
17 what investors thought, how they interpreted information, if
18 that is, in fact, true of the lead plaintiff who they selected
19 to represent the interests of the class.

03:02:11 20 I also note that in their reply papers the plaintiffs
21 said, well, no, the way that you test that is actually to look
22 at the price change.

23 Well, first of all, that doesn't tell you what
24 investors are thinking. And while in a normal case, where
03:02:25 25 you're looking at statistically significant price movements

1 that might have some traction, Dr. Fischel has completely
2 abandoned that here. And, rather, he is offering opinions,
3 he's completely disposing of statistical significance, and
4 he's looking at the data and saying this is what the market
03:02:42 5 was thinking, this is what investors were thinking.

6 He testifies that market participants began to doubt
7 Household's denials, that market participants were
8 re-assessing the risks.

9 So we submit to your Honor that this is a situation
03:02:54 10 where the testimony of the lead plaintiff is absolutely
11 relevant and probative as to the key issue in the case.

12 Briefly, with regard to Magistrate Judge Nolan's
13 opinions, it is true that the defense twice moved to depose
14 the lead plaintiffs. One was a third party -- they served
03:03:10 15 eleven third party subpoenas on the various investment
16 advisers. That was solely -- the defense sought those
17 depositions solely to rebut the presumption of reliance and
18 Magistrate Judge Nolan said no. But Magistrate Judge Nolan
19 did not say, My ruling is that the lead plaintiff will have no
03:03:29 20 role at trial.

21 Same is true of the second time. In that instance
22 she said that the plaintiffs -- the defense could not call
23 that witness to establish truth-on-the-market. Again, nothing
24 in that opinion to suggest that here we are, 15 years later,
03:03:43 25 that the lead plaintiff has absolutely no role at trial.

1 THE COURT: All right. Thank you.

2 I agree with Mr. Dowd. The motion is going to be
3 granted on relevancy grounds without reaching the issue of
4 availability. I believe that there is very slight relevance
03:03:57 5 here but it is outweighed by the confusion that it would cause
6 under 403.

7 So the motion is granted. And I believe that's the
8 only issue on No. 7.

9 So let's move to No. 8. No. 8 is a motion to bar
03:04:16 10 evidence or reference to aggregate damages. And here there is
11 no objection from the defense?

12 MS. MacDONALD: That is correct, your Honor, although
13 we did want to clarify the implication of that -- and I'm not
14 sure what plaintiffs' position is on that -- with regard to
03:04:33 15 market cap losses.

16 MR. BURKHOLZ: So, your Honor, let me make one
17 comment before I get to the market loss representation.

18 Last week in open court Mr. Fitzgerald made a comment
19 about how big this case was. And I'm not gonna say the number
03:04:47 20 again, although it looks like only lawyers are in the
21 courtroom, but there were a couple other people that were not
22 lawyers that were in the courtroom. And he used the number --
23 I think we all heard it; we can look at the transcript -- and
24 it's a big number and he put it out there. And that's exactly
03:05:03 25 what happened in the first trial with their prior counsel,

1 where he made an inference about if they accepted -- in this
2 particular example in the first trial, if they accepted the
3 specific disclosure model, 797, that somehow there would be a
4 multi-billion dollar judgment in this case. And he made the
03:05:23 5 connection between the increase of \$7 at the end of the class
6 period where -- and he said, well, the market capital went up
7 \$3.5 billion.

8 And so he made this connection, and then he made the
9 argument in closing argument. And, of course, it was improper
03:05:39 10 and we don't want that to happen again. We don't want any
11 reference at all to what the potential damages might be in
12 this case.

13 Their prior counsel actually got it wrong with --
14 because that was -- the leakage model ended up being what he
03:05:52 15 was referring to, but he was referring to the specific
16 disclosure model.

17 So we don't want any reference at all in this
18 courtroom to what the potential total damages might be in the
19 case.

03:06:03 20 Now, with respect to their point about market cap
21 loss, the one thing that I want to make clear, we're not going
22 to walk into court -- and last time I had to elicit testimony
23 on market cap loss because of what their lawyer did in front
24 of the jury. But in this particular case we're not going to
03:06:25 25 be putting in front of the jury the market -- the total market

1 cap loss of Household.

2 However -- I just want to be clear about this so we
3 don't have a problem when we go down the road with evidence --
4 we will be comparing Household, like it did in its own
03:06:40 5 documents, the investor relations documents, to large
6 financial institutions like JPMorgan and AIG.

7 And I don't foresee a problem with any of our
8 exhibits or any of the testimony because that is not a
9 discussion of market cap loss. But that is a discussion of --
03:06:58 10 or a reference to the market cap of the companies that are
11 their peers.

12 So I don't think it implicates any of these issues.
13 I just wanted to point it out to your Honor so that we don't
14 have a problem when we get into the trial.

03:07:11 15 There shouldn't be any reference to aggregate
16 damages. We won't make any reference to the market cap loss
17 during the leakage period. But there are going to be
18 documents about -- that are going to reflect the market
19 capitalization of the companies that Household compared itself
03:07:26 20 to. It didn't compare itself to the small companies, a few of
21 them that are in Professor Ferrell's peer groups. They
22 compared themselves to large financial institutions.

23 THE COURT: Ms. MacDonald?

24 MS. MacDONALD: I think that's fine with us, your
03:07:38 25 Honor.

1 THE COURT: Okay. So --

2 MR. BUTSWINKAS: I will say, your Honor, we'll take
3 those documents as they come up. We're not conceding they're
4 admissible.

03:07:51

5 MS. MacDONALD: Yes. We would reserve our right,
6 your Honor, in the event those documents do come up, to
7 revisit the issue.

03:08:01

8 MR. BURKHOLZ: Well, all of these documents have been
9 agreed to pursuant to our agreement. So we'll leave it at
10 that.

11 THE COURT: So No. 8 is granted.

12 Next is No. 9, motion to let or allow the plaintiffs
13 to use certain portions of former defense expert Bajaj's prior
14 trial testimony.

03:08:15

15 MR. FARINA: Your Honor, this is also the flip side
16 of defendants' motion in limine No. 2, where we're seeking to
17 preclude that testimony.

03:08:33

18 We think it's a sideshow, your Honor, and we don't
19 believe that this jury should be deciding whether Professor
20 Fischel's models should be accepted based on something that
21 Dr. Bajaj did in the prior trial.

03:08:52

22 It's almost impossible to present that evidence to
23 the jury without confusing the jury about where the evidence
24 comes from, what happened in the first trial, why was leakage
25 being decided before and being decided now.

1 We think it's a terrible idea to introduce that type
2 of issue into the case when Dr. Bajaj has no probative
3 evidence to offer. He's not a fact witness and he's not being
4 offered as an expert in this case.

03:09:10

5 If they are going to introduce snippets of his
6 testimony, we're going to have to introduce larger components
7 of his testimony to put that in context.

03:09:28

8 He's not the witness we're putting forward, your
9 Honor. We have Professor Ferrell, we have Professor Cornell.
10 They previously argued that we have too many experts and now
11 they're trying to pull in an expert we're not even offering in
12 this case.

03:09:41

13 It has no probative value. And whatever probative
14 value it could have is greatly outweighed by the confusion and
15 prejudice that will follow allowing Dr. Bajaj's testimony to
16 be presented to the jury.

17 MR. BURKHOLZ: Your Honor, if I can speak to the
18 motion that we brought?

19 THE COURT: Yes.

03:09:51

20 MR. BURKHOLZ: With respect to the law, first of all,
21 they had a chance to designate whatever trial testimony they
22 wanted with Professor Bajaj and they did. So that is the
23 testimony we're talking about reading to the jury and using in
24 this case.

03:10:05

25 It's clearly relevant. He used a different index

1 than their current expert and he made admissions about
2 leakage. So the relevance is really not at issue.

3 Is it available for use by us? Yes, it is, under the
4 SEC versus Kona case. And contrary to the argument they make
03:10:27 5 in their papers, we don't have to adopt him as our expert to
6 put the testimony on. The SEC in that case took the
7 deposition testimony of the defendants' expert and they played
8 it to the jury. They didn't retain him, they didn't adopt
9 him. They played it.

03:10:47 10 And the Glendale case that we cited in our papers
11 does a really good analysis of how you can use this testimony
12 under 801(d)(2)(C) as a party admission.

13 They say if the testimony is withdrawn before trial,
14 you can't use it. Once you pass that Rubicon and you use his
03:11:07 15 testimony at trial, the prior trial, it becomes an admission
16 under 801(d)(2)(C).

17 He doesn't need to be an agent of the party. And the
18 Court does a really good analysis of how it's different than
19 801(d)(2)(D). It's is it authorized. And it becomes
03:11:27 20 authorized by the defendants putting him up as their expert,
21 adopting his positions and his opinions throughout the trial.

22 And the cases that they cite, which are the SanDisk
23 and the Kurt case, they rejected the use of a prior expert's
24 testimony because it was from an unrelated case, unlike this
03:11:47 25 situation.

1 And then they do raise another argument with respect
2 to availability. And I hope under 804(b)(1) that he's not
3 available. We had an agreement that that wasn't an issue,
4 that -- and I hope that their papers were just a mistake in
03:12:04 5 the way they presented them in the rush to get everything on
6 file.

7 I mean, we had an agreement that they could object to
8 whether or not his testimony should come in, the argument that
9 was just made by Mr. Farina. But we had an agreement that in
03:12:16 10 addition to three other witnesses that are outside the
11 jurisdiction, that they wouldn't raise the unavailability and
12 force us to try to contact him, which is what you're required
13 to do under that provision.

14 So we had an agreement. We saw what they put in
03:12:31 15 their papers, and so we had to submit the Drosman declaration
16 with the e-mail showing that they made this agreement with us.
17 So we assume that they're retracting that particular argument
18 on unavailability because we did have a deal that that
19 provision -- he's not available under 804(b)(1), that he can
03:12:49 20 -- they're not going to make that argument because --

21 MR. FARINA: I'm not making that argument, your
22 Honor.

23 MR. BURKHOLZ: Okay.

24 MR. FARINA: That's not our argument. Our argument
03:12:56 25 is that his testimony is not relevant. We're not sponsoring

1 him as a witness in this trial, this retrial. And to present
2 his expert testimony and to try to explain his testimony and
3 put it in context, the jury is going to want to know why some
4 other person is going to be offered as an expert when that
5 person doesn't appear.

6 There is an expert, it's Professor Ferrell. There's
7 another expert, it's Professor Cornell. We've not offered
8 Professor Bajaj in this trial, so it's not a circumstance
9 where we offered him in this trial and then are pulling him
10 back. Whatever probative value -- and it is slight, if any --
11 is clearly outweighed by the risk of confusion.

12 It is already going to be extraordinarily confusing
13 to this jury to try to figure out -- and they're going to be
14 guessing -- as to what happened in the first proceedings and
15 why are they here to decide these issues. To infuse the trial
16 with even more confusion by presenting testimony from an
17 expert we're not offering as an expert at this trial, we think
18 is not necessary, not appropriate and is likely to confuse the
19 jury.

20 MR. BURKHOLZ: Your Honor --

21 MR. FARINA: But I'm not arguing hearsay, I'm not
22 arguing availability. We just think this is a bad idea that
23 will confuse the jury.

24 MR. BURKHOLZ: Well, they have to live with the
25 decision they made. They used him in the first trial. Under

1 the case law it's a party admission. We should be able to use
2 it to show that they now are changing their position in this
3 litigation on what the proper peer index is. And it's
4 literally -- that is the key testimony along with his
03:14:29 5 admission on leakage. And, frankly, we should be able to use
6 it in cross-examining their defendants' experts.

7 We cite -- I go back to the Glendale case because
8 it's a really good analysis. And they say you can use it if,
9 quote, the testimony formed part of the underlying facts or
03:14:45 10 data upon which the expert based their opinions.

11 And we have Professor Ferrell's report in this case,
12 Exhibit B, documents relied upon. What does he have in there?
13 Trial testimony and deposition testimony, I believe, of
14 Professor Bajaj.

03:15:05 15 So if he relied on it we should be able to
16 cross-examine their experts on it, and we should be able to
17 play the trial designation, which is relatively short, for the
18 jury because it's an adoptive admission.

19 MR. FARINA: Your Honor, Professor Ferrell and
03:15:19 20 Professor Cornell both specifically address this. They both
21 said that they conducted their own independent assessment and
22 did not rely upon Professor Bajaj's assessment. They said
23 they read his testimony for context. They did not evaluate
24 his opinions, they are not basing their opinions on his
03:15:36 25 opinions. So they are not relying on Bajaj's testimony. And

1 they made that abundantly clear in their depositions.

2 And the plaintiffs had every opportunity to inquire
3 of our experts, Professor Ferrell and Professor Cornell, about
4 Professor Bajaj. They did that. They said, We're not using
03:15:55 5 Professor Bajaj's opinions. I can't critique his opinions
6 because I really didn't study them. I have formed my own
7 independent judgments. We want those independent judgments
8 presented to the jury.

9 MR. BURKHOLZ: Isn't that really what the jury should
03:16:08 10 do? They should hear examination about the documents that an
11 expert relies upon? That we should be able to cross-examine
12 them about those documents that they rely upon, including this
13 testimony?

14 MR. FARINA: Their testimony could not be more clear
03:16:22 15 that they were not relying on his analysis. They have no
16 criticism of it, they have no endorsement of it. They did
17 their own independent analysis. That's what they did, that's
18 what they testified to.

19 MR. BURKHOLZ: And then finally, your Honor, just
03:16:34 20 like a party admission from the first trial, testimony that we
21 can use in the second trial, the testimony of Professor Bajaj
22 fits within the party admission under the case -- the Glendale
23 case and the statute, and we should be able to use it.

24 THE COURT: I agree with plaintiff. The motion, No.
03:16:51 25 9, the final plaintiffs' motion, is granted. The plaintiffs

1 will be able to introduce the testimony of the former defense
2 expert, Professor Bajaj.

3 MR. FARINA: Thank you, your Honor.

4 MR. BURKHOLZ: Thank you.

03:17:07

5 THE COURT: Let's get to the defense motions in
6 limine. And what remains of the defense's first motion in
7 limine?

03:17:25

8 MR. FARINA: Your Honor, I believe that in light of
9 your Honor's rulings and in light of our changes to your
10 Honor's rulings, by agreement defense motion in limine No. 1
11 is moot. I believe No. 2 is also moot.

12 MR. DOWD: That's fine with the plaintiffs, your
13 Honor. We agree.

03:17:49

14 THE COURT: No. 3, defense motion to preclude
15 plaintiffs' expert from expressing opinions not previously
16 disclosed. And this is specifically as to Dr. Fischel.

17 MS. MAHAFFEY: That's correct, your Honor.

18 MR. BURKHOLZ: This is No. 3, your Honor?

19 THE COURT: Yes.

03:18:07

20 MS. MAHAFFEY: Your Honor, while not specifically
21 mooted by the parties' agreement, we think the parties are in
22 agreement about the issues raised in this motion in limine.
23 And provided that the Court grant this motion, we would agree
24 that the same standard would apply to our experts as well.

03:18:25

25 MR. BURKHOLZ: Your Honor, I don't understand the

1 representation being made. I mean, we object to any
2 restriction on Professor Fischel's testimony. I mean, that's
3 what motion in limine No. 3 is trying to do.

03:18:42 4 Unless they're withdrawing the motion in limine, I
5 would like to be heard on it. I don't --

03:19:02 6 MS. MAHAFFEY: Well, let me explain the basis for my
7 representation, which is that in their opposition plaintiffs
8 don't dispute that under Rule 26 they are precluded -- or they
9 should be precluded from offering any testimony by Professor
10 Fischel that was not disclosed to us previously in his expert
11 reports. I don't think that they dispute that. And that's
12 all we're asking.

13 THE COURT: In the abstract you don't dispute that?

14 MR. BURKHOLZ: Not in the abstract, no.

03:19:12 15 There's particular documents that are in his reports
16 and that he testified at trial that they don't want him to
17 testify about. And we're letting their expert testify about
18 documents that aren't even in his reliance materials, in
19 Institutional Investor magazine. It seems very unfair. And
03:19:28 20 he should be able to testify about documents that are in his
21 expert report or in his reliance materials.

22 MS. MAHAFFEY: Your Honor, I should be clear.

03:19:40 23 We are not objecting to Professor Fischel testifying
24 about documents that are in his reliance materials or in his
25 expert report.

1 MR. BURKHOLZ: Okay.

2 MS. MAHAFFEY: The basis --

3 THE COURT: Or are incorporated in --

4 MS. MAHAFFEY: The basis for the motion was certain

03:19:52

5 statements made by Professor Fischel during his deposition
6 that indicated that he may seek to go beyond the documents and
7 testimony that is included in his -- I'm sorry, the documents
8 and opinions that are expressed in his reports. And we just
9 want a preclusive ruling saying that he can't do that at the
10 trial.

03:20:11

11 We don't think that would be fair. He's had six
12 reports. He's had the last word in this case. Your Honor
13 allowed him to provide a surrebuttal report after our expert
14 reports. We just think that there's no excuse for him going
15 beyond the opinions that he's already previously expressed in
16 those six reports in the case.

03:20:25

17 MR. BURKHOLZ: And I don't think there's anything he
18 said at his deposition -- I defended him -- that was anything
19 beyond the opinions he's given in this case.

03:20:37

20 THE COURT: And specific information is objected to
21 in this motion, correct?

22 MR. BURKHOLZ: Exactly.

23 THE COURT: All right. And as to that information --
24 I'm trying to figure out whether, in fact, there's still a
25 motion -- whether the motion that was filed is still your

03:20:46

1 position or whether you're amending it or withdrawing it?

2 MS. MAHAFFEY: Well, specifically, your Honor, during
3 his deposition Professor Fischel said at least seven times
4 that he could have included more dates under the specific
03:21:02 5 disclosure model. He never did. He was given six
6 opportunities to amend his opinions if he wanted to.

7 And we don't think it's proper for him to testify
8 that there are additional dates under the specific disclosure
9 model during the trial when he's had six opportunities to let
03:21:18 10 us know what those additional dates might have been.

11 MR. BURKHOLZ: Okay. Now we're getting to the second
12 part of the motion. So the first part he can testify --
13 you're not disputing he can testify about any exhibits or
14 materials that are in his report or reliance materials.

03:21:32 15 So now we're to the specific disclosure model. And
16 he did testify at the first trial -- we have it in our papers
17 -- that he could have used other dates in his calculation of
18 the \$8 of inflation on the specific disclosure model. And he
19 pointed to the 93 dates in -- that Professor Bajaj had said
03:21:56 20 were relevant, and he said on the stand, If I included those
21 93 dates that the defendants' expert said were fraud related,
22 my inflation would increase from 7.97 to \$15. That's what
23 came out in front of the first jury.

24 He said, However, I didn't do that. And here is my
03:22:16 25 inflation calculation for the specific disclosure model, but

1 for the leakage model you need to consider all of the
2 disclosures that come out during the leakage period.

3 And they've raised the -- so he should be able to
4 point to that in this particular situation.

03:22:32

5 And then with respect to other fraudulent -- sorry,
6 other fraud related statistically significant clients that he
7 didn't include in this current calculation of the specific
8 disclosure model, there's no reason he can't refer to them.
9 He's going to say why he didn't include them. They can

03:22:53

10 cross-examine him.

11 Professor -- I mean, Mr. Farina did a nice job at the
12 deposition. I'm sure he'll be good at trial. But he should
13 be able to explain the relevance of those dates and why he
14 didn't include them in the calculation and they can
15 cross-examine him.

03:23:08

16 THE COURT: Counsel?

17 MS. MAHAFFEY: Your Honor, that he could have
18 included additional dates is not his opinion. Professor
19 Fischel put forth two specific requirements for a date to be
20 included in his specific disclosure model; that is, that there
21 was a statistically significant price movement that he was
22 reasonably confident was caused by a fraud related disclosure.
23 He found 14 of those. He never stated that he found another
24 one.

03:23:23

03:23:39

25 And, quite frankly, it doesn't make any sense that he

1 says he could have found another one because he didn't.
2 That's not his opinion. That's not proper for him to say
3 that.

03:23:54

4 THE COURT: The motion that's before me is going to
5 be denied as to the specific preclusions that the defense
6 seeks. Those motions are denied in terms of the general
7 notion that he cannot testify to previously disclosed
8 information. That is true. The plaintiff does not dispute
9 that, that the specific objections are overruled.

03:24:15

10 The motion is denied. He can testify as he testified
11 previously, that he could have included more dates under the
12 specific disclosure model. Motion is overruled.

13 MR. BURKHOLZ: Thank you, your Honor.

14 THE COURT: Thank you.

03:24:36

15 Next, defense No. 4: To exclude evidence concerning
16 expert witnesses that is unrelated to their opinions and
17 testimony.

18 MS. MacDONALD: Thank you, your Honor.

03:24:57

19 THE COURT: Ms. MacDonald, I ruled earlier on two of
20 these, right -- at least two of them?

21 MS. MacDONALD: I --

22 THE COURT: Or at least I indicated which way I was
23 leaning --

24 MS. MacDONALD: Yes.

03:25:06

25 THE COURT: -- regarding the fact that defendants

1 tried to hire Fischel?

2 MS. MacDONALD: Yes, you did, your Honor. And I
3 think you also slipped in the defendants' counsel's statements
4 at trial about Fischel as well.

03:25:18 5 THE COURT: As to the second, complimentary questions
6 asked of Fischel by -- I'm sorry --

7 MS. MacDONALD: The third -- are you moving on to
8 third category, your Honor?

9 THE COURT: Complimentary statements about Fischel
03:25:30 10 and his company made by defendants' current experts.

11 MS. MacDONALD: Exactly.

12 THE COURT: You also seek to bar those?

13 MS. MacDONALD: Yes, your Honor.

14 These -- as with the other two, they're not evidence.
03:25:37 15 They are irrelevant. We think it will sufficiently confuse an
16 already confused jury to have to be hearing about consulting
17 experts and who thinks what about various staff members at
18 consulting experts' shops.

19 Plaintiffs previewed for us what they intend to do
03:25:57 20 with this information in their briefing, which is to suggest
21 that -- setting aside the fact that Professor -- Drs. Cornell
22 and Ferrell have contracts with Compass Lexecon that provides
23 a right of first refusal such that those experts, to the
24 extent Compass Lexecon is not conflicted, they are required to
03:26:18 25 use Compass Lexecon as their support staff.

1 The plaintiffs want to make some -- because in this
2 case Dr. Fischel had been retained by plaintiffs and, thus,
3 Compass Lexecon was, in fact, conflicted, those experts turned
4 to a different consulting shop.

03:26:31 5 So plaintiffs have said in their papers some
6 suggestion that our experts', the defense experts', quote,
7 first choice, end quote, was to use Compass Lexecon, that's
8 just not accurate. I mean, it's a contractual requirement.
9 But there seems to be some sort of innuendo that somehow their
03:26:49 10 consultants are better than our consultants. We think it's
11 just improper and has no business going in front of the jury.

12 THE COURT: Mr. Dowd?

13 MR. DOWD: Yes, your Honor.

14 Your Honor, have you already ruled on the attempted
03:27:00 15 retention in defense counsel's statements?

16 THE COURT: Yes.

17 MR. DOWD: Then I won't address those.

18 I think as to the defendants' experts' comments about
19 Fischel, I think it's something that's clearly relevant.

03:27:12 20 I mean, when we say to Professor Ferrell, defendants'
21 expert, what do you think of Professor Fischel as an
22 economist, and he says he's a very smart and talented
23 economist, I mean, how do I not get that in? I should get
24 that in. It's relevant, it's relevant that their expert
03:27:30 25 thinks that our expert is very talented and very smart.

1 And then both Ferrell and Cornell were asked, do you
2 think Professor Fischel is honest? And they said, yes, I
3 think he's honest, both of them. And I think we should be
4 allowed to ask that. I think that it's clearly relevant.

03:27:50

5 I mean, a witness' credibility is always relevant.
6 No different for an expert than anybody else. Credibility is
7 always an issue. So as to honesty, we should be able to ask
8 that question of their experts.

03:28:05

9 As to their qualifications, I mean, that's always
10 relevant to an expert. You should always be able to consider
11 an expert's qualifications. It's something the jury has to
12 consider.

03:28:18

13 And if their expert is willing to concede that our
14 expert is a very smart and talented economist, we should be
15 able to put that in, your Honor.

03:28:31

16 I think -- you know, the defendants say, well, you
17 know, it's more prejudicial than probative, and then they cite
18 cases. Your Honor, when I read them it's like -- you know, it
19 says if it's -- it's unfairly prejudicial if it appeals to the
20 jury's sympathies, arouses its sense of horror or provokes the
21 instinct to punish. I mean, this isn't 403. It's just not.

22 I mean, is Professor Fischel honest? Yes, he is,
23 from both of their experts. It's not going to waste any time.
24 It's just not prejudicial under the standard.

03:28:49

25 Same thing with their statements that they made about

1 that he's a very smart and talented economist. I mean, we
2 asked it in the deposition purely to see what they'd say and,
3 you know, they gave us the answers that we wanted. I think
4 it's relevant. I don't think that it's prejudicial in any
5 way.

6 And, you know, the same issue for the fact that they
7 use Professor Fischel's people as their first choice. It's
8 interesting. I laughed just now when Ms. MacDonald said that
9 about, you know, it's not a choice, it's a contract. That's
03:29:21 10 actually what Professor Ferrell said. And I said that must be
11 what they, you know, teach you at the Harvard Law School,
12 where he is. But, you know, like in Michigan, where I went,
13 if you entered into a contract, it was because you did it by
14 choice. So, I mean, that's what -- you know, that's what
03:29:36 15 happens with these guys.

16 They both have as their first choice for economic
17 analysis and support the people that are supporting Fischel
18 right now, and I think we should be able to ask them about
19 that. I think it's relevant. I don't think it's prejudicial.
03:29:53 20 I don't think it's fair for defendants to say it's not a
21 choice when they entered into a contract where they say these
22 are the guys I want to use. This is the first choice for my
23 economic analysis.

24 So I think certainly as to credibility and
03:30:07 25 qualifications, the fact that they said he was a smart and

1 talented economist should come in. The fact that they said he
2 was honest should come in, as to both defendants. And I also
3 think the fact that, you know, this is their first choice for
4 support should come in. But certainly the first two.

03:30:23

5 Thank you, your Honor.

6 MS. MacDONALD: Your Honor, I want to be clear.

7 To my knowledge, no defense expert used the words
8 "first choice." That is Mr. Dowd's words. So that just
9 wasn't said before.

03:30:31

10 I think none of this is relevant. It's confusing to
11 the jury. It's not probative of anything. So, you know,
12 we'll stand by that we think that that does not belong in the
13 trial.

03:30:44

14 THE COURT: All right. The ruling is that the motion
15 is granted.

16 As to efforts by the defendant to hire Fischel first
17 but the plaintiffs got -- or efforts to hire Fischel but the
18 plaintiffs got to him first, that is out. Also out are
19 complimentary questions asked by a former defense attorney on
20 the case. But the motion to bar the complimentary statements
21 about Fischel and his company made by defense -- defendants'
22 current experts is denied.

03:31:06

23 MR. DOWD: Thank you, your Honor.

24 THE COURT: Thank you.

03:31:22

25 Let's go to our next motion, motion to preclude

1 references to non-parties, HSBC and HSBC Finance.

2 Ms. MacDonald?

3 MS. MacDONALD: Thank you, your Honor.

4 MR. DOWD: Your Honor, could I just have one second

03:31:45 5 with Ms. MacDonald?

6 THE COURT: Yes. Let's take ten minutes. We'll

7 start up at 20 till.

8 (Brief recess was taken.)

9 THE COURT: All right, counsel, we are on Defense No.

03:44:55 10 5, correct?

11 MS. MacDONALD: Yes, your Honor.

12 This is defendants' motion to exclude references to
13 HSBC. Your Honor, HSBC is not a party. We submit they're
14 even less relevant than the lead plaintiff. So they acquired
03:45:14 15 Household after the class period. HSBC is not a party.

16 They're not here. They are a large bank. We think any
17 reference to them not only is it not relevant, but it's also
18 confusing to the jury.

19 The plaintiffs in opposing have basically made two
03:45:29 20 arguments. They say that HSBC's identity as to Household's
21 parent company is relevant to loss causation. This is, by
22 definition, not true because, of course, the merger happened
23 after, and was announced after, the end of the class period.
24 All that matters is what happened to the stock price by the
03:45:44 25 last day of the class period, which is October 11th, 2002. A

1 merger that was announced a month later, by definition, is not
2 relevant to loss causation.

3 And, then, the second thing that we see from their
4 papers is that they intend to argue that there are references
03:45:59 5 to HSBC in various documents that the experts have relied
6 upon. On that, your Honor, it's just a pretext. They're
7 using documents that are after the class period that make a
8 point about, in this case, non-fraud-related factors that may
9 have impacted the stock price. It's just by virtue of the
03:46:16 10 fact that it appears in an article that is also about the
11 merger.

12 So we submit that those are not critical documents.
13 They could be -- that point could be made in a different way.
14 But if we needed to, we could come up with some sort of
03:46:29 15 redaction or some way to address that issue.

16 So, again, stepping back, we just think it's not
17 relevant; it's confusing; happened after the close of the
18 class period; and, therefore, it's not relevant.

19 MS. STAKEM: Good afternoon, your Honor, Hillary
03:46:42 20 Stakem for the plaintiffs.

21 Your Honor, just as an initial matter, the defendants
22 spent a good portion of their motion on the subject matter of
23 trying to preclude plaintiffs from referencing either HSBC or
24 HSBC Finance's net worth or financial condition. No court
03:47:00 25 order on that is actually necessary. Plaintiffs have

1 absolutely no intention of referencing either HSBC or HSBC
2 Finance's net worth or financial condition. So that's really
3 a non-issue.

03:47:18 4 With respect to the second portion of defendants'
5 motion, though, which actually seeks to preclude reference
6 even to the fact that HSBC acquired Household, that, you know,
7 we do take issue with. The defendants' claim is that it will
8 be prejudicial because the jury, if they find out that HSBC,
9 this large bank, acquired Household, they might be more likely
03:47:37 10 to award additional damages beyond what they otherwise would.
11 And, frankly, your Honor, those claims -- that's completely
12 speculative. We submit that it's very unlikely.

13 And, frankly, your Honor, the jury is not going to be
14 under any illusion that Household is some small company. You
03:47:56 15 know, they have 50 million active customer accounts. It was
16 largely at issue in the last trial that there were 32,000
17 employees. Household was a large financial institution. And
18 I don't see how the fact that another large financial
19 institution acquired it is prejudicial or will encourage the
03:48:15 20 jury to decide the issues on an improper basis.

21 THE COURT: And, Ms. Stakem, the plaintiff has no
22 intention of arguing that it is a banking giant, et cetera, or
23 referencing the stature of HSBC?

24 MS. STAKEM: No, your Honor.

03:48:31 25 The reason that HSBC is actually relevant to loss

1 causation is because in the context of the merger, the market
2 was actually discussing various factors that related,
3 actually, specifically to loss causation, including
4 Household's problem accessing low-cost funding, their bond
03:48:52 5 spreads widening, various other factors that actually
6 defendants' expert Farrell puts directly at issue, claiming
7 that they are categories of non-fraud information.

8 Now, Professor Fischel disputes that and actually
9 cites in his report a Chicago Tribune article in which
03:49:09 10 defendant Aldinger directly links the concerns, such as the
11 ability to locate low-cost funding, to the defendants' fraud,
12 concerns in the market about predatory lending, et cetera.

13 So, you know, the fact was that HSBC, the market
14 felt, got a deal on Household; and, part of that was because
03:49:32 15 basically defendants' fraud had damaged the value of the
16 company so much.

17 So we feel that it is very relevant, and that there
18 is no prejudice from mentioning the fact that HSBC is
19 Household's parent company.

03:49:45 20 THE COURT: Ms. MacDonald?

21 MS. MacDONALD: Your Honor, the notion that HSBC
22 acquired a damaged company is based entirely on the stock
23 price that they paid. When you merge -- when two companies
24 merge, the determining factor for how much it costs is the
03:49:59 25 stock price. It has nothing to do with the fraud.

1 The class period ended on October 10th, 2002. The
2 idea that something happened a month later, a year later, a
3 decade later somehow sheds light on what affected the stock
4 price months or weeks before is, I submit, a pretext. It's
03:50:16 5 not possible. It's literally impossible.

6 The idea that the experts rely on documents that,
7 again, are looking backward in time and making observations,
8 again we submit that those are not relevant. Those exact
9 same -- what is actually relevant are sort of contemporaneous
03:50:36 10 observations by analysts and investors, not backward-looking
11 ones.

12 But as I said earlier, to the extent there are
13 particular documents -- they flagged one in their briefing,
14 and I think that it would be an easy workaround to redact or
03:50:49 15 excerpt the quotes that they want to use without getting into
16 the merger.

17 MS. STAKEM: Your Honor, if I may just respond
18 briefly?

19 THE COURT: Yes.

03:50:57 20 MS. STAKEM: In the first place, one of the
21 documents, for example, that mentions HSBC that we've
22 identified, it comes from Category I of the defendants'
23 motion. This is from an individual, Curt Cunningham, who was
24 the Director of Household Mortgage Services Policy and
03:51:17 25 Compliance Support. And if I may just read the first

1 paragraph here so you can see the connection between the HSBC
2 merger and defendants' fraud --

03:51:31 3 THE COURT: Ms. Stakem, I'm going to cut you off
4 because the motion's going to be denied. The first part of
5 the motion, I don't think there's any prejudice. The
6 plaintiff is not going to make inappropriate arguments or
7 dwell on the size of HSBC vis-à-vis Household.

03:51:50 8 As to the second part of the motion, it's moot as the
9 plaintiff is not going to introduce evidence about the
10 financial condition of HSBC or HSBC Financial. Right?
11 Finance?

12 All right. Next, we've got the individual
13 defendants' motion to bar evidence regarding their financial
14 condition.

03:52:07 15 MR. DOWD: Your Honor, that's resolved by the
16 agreement that the parties reached this morning.

17 THE COURT: All right. So that is moot.

18 MR. FARINA: Your Honor, I think Mr. Dowd and we can
19 get this stipulation to your Honor probably tomorrow --
03:52:26 20 tomorrow morning. We just need to clean it up a little bit.
21 We should be able to provide that for your Honor.

22 THE COURT: In terms of the pretrial order then, does
23 it make sense to hold off or are there things that we can
24 resolve that are not resolved?

03:52:45 25 MR. FITZGERALD: Your Honor, it might make sense for

1 all of us to look at the filings, again, in light of what
2 we've done today. I know there's like a short statement of
3 the case, but the nature of the case has changed for both of
4 us. And so --

03:52:56

5 THE COURT: Would it make sense to come back here
6 tomorrow afternoon, say? Otherwise -- well, I want to move up
7 the briefing on the motion to reconsider. I'm going to ask
8 the plaintiff to respond in two days so I can get a reply on
9 Friday. So, response on Wednesday, reply on Friday to the
10 motion to reconsider.

03:53:13

11 Monday is a holiday. Does it make sense to come back
12 here before next Tuesday or just come back here next Tuesday?

03:53:32

13 MR. DOWD: Your Honor, in looking at the final
14 pretrial order, I think, you know, we had substantial
15 agreement about, you know, the descrip- -- the short
16 description of the case isn't going to be a problem now. We
17 already have a long description of the case that both parties
18 agree to. So --

03:53:47

19 THE COURT: My sense was that I could simply use the
20 one paragraph the parties agreed to as part of the
21 questionnaire.

22 MR. DOWD: That was our thought, as well, your Honor.
23 That's what kind of made sense because it's --

03:53:55

24 THE COURT: Obviously, that's just the prospective
25 jurors. They don't need much more than that.

1 MR. FITZGERALD: That makes sense, Judge.

2 MR. DOWD: And I think we covered the questionnaire
3 last week. I think the exhibit lists and the witness lists,
4 almost everything is going to be resolved. So I don't really
03:54:07 5 see any issues. If there are any issues, I think the parties
6 can raise them with the Court, you know, down the road a
7 little bit. I think that makes more sense if there's any
8 serious objections. But I think we've covered pretty much
9 everything with respect to that.

03:54:21 10 I think the Court gave some guidance today about
11 statements of qualifications of the experts, and some of the
12 objections to that are actually resolved by the stipulation,
13 as well. But we can certainly talk to the defendants about
14 that.

03:54:35 15 And I think the deposition designations also, I
16 believe, are pretty much cured by this. The deposition
17 designation for the one witness is going in as is. And I
18 think to the extent they want to play Hueman, I think that we
19 agreed on that, as well.

03:54:54 20 But then you just get to verdict form and jury
21 instructions. The Court said you intended to address the jury
22 instructions down the road, and we got guidance today on the
23 verdict form.

24 The motions in limine, we dealt with. And we had
03:55:09 25 already talked about, you know, timing -- that's in the

1 stipulation -- as well as the remaining issues.

2 So I don't think there's any reason to come back
3 tomorrow afternoon, is the long and short of it.

03:55:22 4 MR. FARINA: Your Honor, I think we would agree with
5 that. We'll go over what's left with -- carefully we'll do
6 that with Mr. Dowd. And I think we can provide to you
7 documents that are agreed upon by the parties.

8 We do want to have, if we can, that argument that was
9 discussed on the reconsideration motion, but I don't think we
03:55:40 10 need to be back here before that argument.

11 THE COURT: On Tuesday?

12 MR. FARINA: On Tuesday, yes, your Honor.

13 THE COURT: Okay.

14 All right. So, let's say Tuesday at 10:30 -- that is
03:55:53 15 May 31st at 10:30 -- so I can get the rest of the call done.

16 In terms of the questionnaire, I will let the parties
17 know that I am looking at it. It does seem like a lot of
18 questions and sub-questions. I believe there are 60
19 questions, but it's a lot of information. I'm taking a look
03:56:18 20 at that to see if it can be streamlined a little bit.

21 What do the parties anticipate in terms of the
22 questionnaire and how it relates to the rest of voir dire?
23 The parties anticipate reviewing the answers, obviously, that
24 the jury gives that morning and, based on those answers,
03:56:39 25 making their challenges?

1 MR. DOWD: Well, I'd like to see the jurors, as well,
2 your Honor. So, I'd still like the Court to --

3 THE COURT: Absolutely.

4 MR. DOWD: -- give us -- I asked if I could, you
03:56:50 5 know, have -- if we could have 30 minutes of attorney-
6 conducted voir dire per side. Even 15 or 20, your Honor, I'd
7 take.

8 THE COURT: And the defense's position on that?

9 MR. FITZGERALD: That we should follow the usual
03:57:02 10 practice in this courthouse and save our argument for opening
11 argument and use the voir dire for voir dire.

12 MR. DOWD: Well, you know, your Honor, I don't know
13 about the local practice. The only time I tried a case in
14 here was in front of Judge Guzman and he gave me attorney-
03:57:15 15 conducted voir dire. And, you know, we don't give opening
16 statements in voir dire. We ask jurors questions about their
17 backgrounds and things like that.

18 So I completely disagree with Mr. Fitzgerald. I
19 think we ought to get 20 minutes. It's not too much to ask to
03:57:30 20 put a little meat and bones on the dry questionnaires. And,
21 obviously, I want to look at the jurors as I make decisions
22 about them.

23 MR. FITZGERALD: Your Honor, it's not our view we
24 limit it to the questionnaires, but we think that you should
03:57:41 25 ask the jurors questions. And that's the standard practice.

1 It just takes out any incentives for any of us to try to
2 precondition the jurors. Your Honor asks the follow-up.
3 We'll get to see them. We'll get the relevant questions
4 answered. It will be efficient.

03:57:56

5 MR. DOWD: I just think that --

6 THE COURT: I'm trying to find where in the motion --
7 I know I read it, but I'm trying to figure out where exactly
8 that is contained in the motion within the first -- I should
9 say the pretrial order. It's within the first --

03:58:08

10 MR. DOWD: Yes, your Honor. It's in the section
11 about the jury questionnaire. It's in 2(b). And it says --
12 right before you get to the exhibit numbers like B-1, B-2, it
13 says, plaintiffs propose that each side be allowed 30 minutes
14 of attorney-conducted voir dire. Defendants oppose
15 plaintiffs' request and believe any further voir dire should
16 be conducted by the Court.

03:58:27

17 So it's on Page 3 right above the list of the B
18 exhibits.

19 THE COURT: What page?

03:58:39

20 MR. DOWD: Page 3 of the proposed final pretrial
21 order. Then there's a list there, your Honor. See B-1, B-2,
22 all that? Right above that it says, plaintiffs propose each
23 side be allowed 30 minutes of attorney-conducted voir dire.

24 THE COURT: Over the plaintiffs' objection, that
25 request is going to be denied. I will ask the questions. I

03:59:00

1 will have input from the attorneys -- further input from the
2 attorneys -- if there are any specific follow-up questions the
3 attorneys have once they review the questionnaire, and the
4 attorneys will be given time to do that. I'll figure out
03:59:16 5 exactly what the mechanics are.

6 But, clearly, I'm going to talk to the jury, make
7 introductory statements. And so the attorneys will have a
8 chance to view the jurors -- prospective jurors. And the
9 attorneys, in fact, submitted questions for me to consider
03:59:43 10 asking the jurors.

11 MR. DOWD: Yes, your Honor. Those are contained
12 in --

13 MR. FITZGERALD: B-5, I believe.

14 MR. DOWD: Right. There's four from each side.

03:59:55 15 MR. FARINA: So, the questionnaire that includes the
16 ones that we agreed upon, and then we both had ones that we
17 wanted that the other side objected to and those are set out
18 separately.

19 THE COURT: Right. And I had reviewed those. And
04:00:11 20 before I reviewed them, my sense was that these are questions
21 that the attorneys felt would be more properly asked directly
22 by me; but, in reviewing them, it appears that they were just,
23 as Mr. Farina pointed, just questions that the attorneys
24 couldn't agree on.

04:00:29 25 MR. FARINA: That is a more accurate description.

1 MR. FITZGERALD: Actually, Judge, I think on Page 1,
2 it says, the following are questions that the parties did not
3 agree to include in the proposed written jury questionnaire.
4 Thus, plaintiffs and defendants propose that the Court ask the
5 following questions in oral voir dire.

04:00:42

6 THE COURT: Right.

7 My point was that it wasn't because of the nature of
8 the questions.

9 MR. FITZGERALD: Oh, okay. Got it.

04:00:48

10 THE COURT: They were --

11 MR. FITZGERALD: Yes.

12 THE COURT: -- simply questions that the parties
13 wouldn't agree to include in the questionnaire.

14 MR. FITZGERALD: That's fair.

04:00:52

15 THE COURT: I've reviewed them. I think the
16 questionnaire is dense. It's lengthy. And over objection, I
17 will not ask these eight questions, four proposed by the
18 plaintiffs, four proposed by the defendants.

19 Trying to get some information to the lawyers as we
20 get closer to trial, but I will wait for the joint submission
21 before we go forward with the rest of the remaining issues so
22 that I can tell exactly what is left to be determined.

04:01:12

23 All right. So we are going to then recess, pass the
24 case until Tuesday. In the meantime, I will review the
25 briefing. And we'll have brief opening -- or brief argument

04:01:37

1 on the motion to reconsider and the remaining motion in
2 limine, and we will be able to figure out exactly what else we
3 can accomplish beginning at 10:30 on Tuesday, May 31st.

4 Anything else today?

04:02:02

5 MR. FARINA: Your Honor, just on the revisions to the
6 pretrial order and the stipulation, we could have the
7 stipulation to you tomorrow. In looking at the pretrial
8 order, there are a number of things -- we want to look at it
9 carefully -- that probably have changed. So do you want
10 everything at once after we've all had a chance to go through
11 it, or do you want things as we finalize it?

04:02:16

12 THE COURT: The sooner I get some information, the
13 better. So I want to encourage the parties to continue to
14 work. But to the extent that you already have reached certain
15 agreements, let me know in one filing -- one initial filing.
16 And, then, as other agreements come in, feel free to let us
17 know.

04:02:35

18 MR. FARINA: Terrific. We will do that. Thank you.

19 THE COURT: All right. Thank you.

04:02:47

20 MR. FITZGERALD: Thank you, Judge.

21 MR. DOWD: Thank you, your Honor.

22 (Hearing adjourned until May 31, 2016, at 10:30 a.m.)
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* * * * *

We certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Nancy LaBella May 24, 2016
Official Court Reporter

/s/ Mary Hacker May 24, 2016
Official Court Reporter

/s/ Joseph Rickhoff May 24, 2016
Official Court Reporter